[fol. 105] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 29th, 1943

No. 10517

J. M. SARTOR, et al.,

versus

ARKANSAS NATURAL GAS CORPORATION

On this day this cause was called, and, after argument by G. P. Bullis, Esq., for appellants, and Elias Goldstein, Esq., for appellee, was submitted to the Court.

[fol. 106] OPINION OF THE COURT—Filed March 29, 1943

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10517

J. M. Sartor, et al., Appellants,

versus

ARKANSAS NATURAL GAS CORPORATION, Appellee

Appeal from the District Court of the United States for the Western District of Louisiana

(March 29, 1943)

Before Hutcheson, Holmes, and McCord, Circuit Judges

HUTCHESON, Circuit Judge:

The suit as originally brought in 1933 was for the value of gas (calculated at the market price) taken by defendant from wells in the years 1927 to 1933, inclusive, under an oil and gas lease in what is known as the Richland Field. The

claim was that though the lease secured to plaintiffs, payment at the market price for all gas taken, defendant, during the years in question, had paid them only 3 cents per [fol. 107] 1000 cubic feet, which plaintiffs alleged was much less than the market price.

The defenses were: a denial that the market price was as claimed by plaintiffs, and an affirmation that defendant had for all the years in suit paid plaintiffs the full market price for all the gas it had taken under the lease; a plea of prescription as to all gas produced and sold prior to March 21, 1930; and pleas in reconvention. Plaintiffs' exception of vagueness to defendant's reconventional demand was sustained, and there was a trial to a jury on the theory advanced by plaintiffs that what in these litigations has come to be known as pipe line contracts were in and of themselves proof of market price. There was a verdict and judgment rejecting defendant's plea of prescription, a finding based on the pipe line contracts, awarding plaintiffs a substantial recovery of a market price considerably above 3 cents for the whole period in suit and a judgment for them.

Appealed to this court, the judgment was reversed [1] because of the error in admitting the pipe line contracts as proof of market price, the court holding, for the reasons stated in the opinion, that the prices stated in these contracts were not, and could not be taken as, the market price stipulated for in the lease. There was also a holding that defendant's plea of prescription should have been sustained. Tried again after the remand, defendant's plea of prescription was sustained, and there was a verdict for plaintiffs for the period from March, 1930, to March, 1933, of $3852.92, and for defendant, on its reconventional demand, for $3,547.35. From the judgment on that verdict, plaintiffs appealed. On that appeal [2] this court determined that in view of the issues tendered on that trial, the plea of prescription should not have been sustained, and affirming the [fol. 108] judgment for the period beginning March 20, 1930, and ending March 20, 1933, it sent the cause back for trial on the issues tendered in respect of the years 1927, 1928, 1929 and 1930, as to which defendant's plea of prescription had been sustained. The cause again coming on

[1] Arkansas Natural Gas Co. vs. Sartor, 78 Fed. (2) 924.

[2] Sartor vs. Arkansas Natural Gas Co., 98 Fed. (2) 527.

for trial, the district judge again ruled that the claims for these years were barred by prescription, and the cause, appealed again, was reversed again[3] because of this ruling with directions to proceed in accordance with the mandate entered on the prior appeal. In the meantime, this court, in *Sartor vs. United Gas Public Service Co.*, 84 Fed. (2) 436, again holding as it had held in *Arkansas Natural Gas Co.*, 78 Fed. (2) 924, that the pipe line contracts were not admissible to prove market price, and that plaintiffs were entitled to receive for the gas not the pipe line prices but the market price at the well, laid down the rule that the object and purpose of the inquiry in a case of this kind is to determine (1) the market price at the well, or (2), if there is no market price at the well for the gas, what it is actually worth there. In the same opinion it was also declared that plaintiffs were entitled to, and defendant should pay them for one-eighth of the gas taken, the market value at the well if there was a market value there, and if there was not, its actual value there. In determining this actual value, said the court, every factor properly bearing upon its establishment should be taken into consideration. Included in these are the fixed royalties obtaining in the leases in the field considered in the light of their respective dates, the prices paid under the pipe line contracts, and what elements, besides the value as such of the gas, were included in those prices, the conditions existing when they were made, and any changes of conditions, the end and aim of the whole inquiry, where there was no market price at the well, being to ascertain upon a fair consideration of all relevant factors, the fair value at the well of the gas produced and sold by defendant. [fol. 109] Also, the Supreme Court of Louisiana in *Sartor vs. United Gas Public Service Co.*, 173 So. 103, held in full accord with our opinions in the two earlier *Sartor* cases, that the pipe line contracts did not represent, and were not admissible to prove, the market value at the well under a lease providing for the payment of market price. Saying: "The theory that royalty owners should receive settlement based upon pipe line prices has been rejected by the Federal Court in two recent cases, *Arkansas Natural Gas Co. vs. Sartor*, 78 Fed. (2) 924, and *Sartor vs. United Gas Public*

[3] Sartor vs. Arkansas Natural Gas Co., 111 Fed. (2) 772.

Service Co., 84 Fed. (2) 436", the court declared [4] that the evidence in the case established that there was a market price at the well, and that this being so, the pipeline contracts were not admissible to overcome or affect the market price so established. Subsequent to the decision of this case, there were three other gas recovery cases decided in this court.[5] In all of these cases, the rules heretofore stated were reaffirmed, and though in the *Pardue* case it was declared that the proof defendant had made of a few sales at the well was not sufficient to establish a market price there for the whole period of the suit, the court reaffirmed the [fol. 110] principle that if the evidence had established such a market price, resort to the pipe line contracts and other

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[4] The court said:

"In the case presently under consideration, the testimony shows that natural gas has a 'market value' at the wells of 3 cents per thousand cubic feet. The defendant called numerous witnesses, all engaged in the business of producing and selling natural gas in the Ouachita and Richland fields. These witnesses without exception testified that the market value of the gas at the wells in the field was 3 cents. Innumerable lease contracts were introduced in evidence, practically all of them showing that the lessors were to be paid royalties based upon the value of the gas at 3 cents per thousand cubic feet.

A detailed review of the testimony introduced by defendant to show the market value of the gas at the wells in these fields would serve no useful purpose. It suffices to say that defendant proved conclusively that the market price in these fields does not exceed 3 cents per thousand cubic feet.

As we have already stated, plaintiff offered no testimony as to the value of gas except that stipulated in the so-called pipe line contracts. Having rejected the theory that the prices stated in these contracts should be accepted as a basis for settlements with these royalty owners, we must rely upon the testimony introduced by defendant to show the market value of gas at the wells or in the fields where it is produced."

[5] Pardue vs. Union Producing Co., 117 Fed. (2) 225; Driskell vs. Union Producing Co., 117 Fed. (2) 229; Hemler vs. Hope Producing Co., 117 Fed. (2) 231.

such testimony to establish the value of the gas would not have been admissible.

The decisions, state and federal, standing thus, the defendant filed its motion in this cause for summary judgment. Averring in it that for the years in question remaining in the suit, there was a prevailing market price of 3 cents or less at the well and there was, and could be, no genuine issue of fact to the contrary for trial to a jury, it supported the motion by numerous affidavits to that effect. Plaintiffs, insisting that in former trials of this case a jury had found for plaintiff a market value in excess of 3 cents, and arguing as they have consistently done, exactly contrary to the decisions of this and the state court, *supra*, that the pipe line contracts were evidence of, and determined, this market value to be more than 3 cents, offered neither affidavit nor proof of any kind rebutting the effect of the affidavits filed in support of defendant's motion that, as to the years in question in this suit, there was a market value at the well of 3 cents, and, therefore, resort to proof of actual value was neither necessary nor proper. The district judge, holding, that under the law, as established by Federal and state decisions, evidence of pipe line prices was inadmissible if the evidence showed that there was a market price at the well, and that it appeared without contradiction that there was such a price, granted the motion for summary judgment and entered judgment accordingly. We think it clear that in so doing, he was right. We have written often [6] on the nature and effect of Rule 56, the rule for summary judgment. Our views, as there expressed, leave in no doubt that the summary judgment rule is a salutary one for the purpose of avoiding unnecessary trials, that is, trials where there is nothing of fact to be tried. [fol. 111] They leave in no doubt too that on such a motion it is the duty of counsel for plaintiff and defendant to fully disclose what the evidence will be on the issues raised by the motion, and of the district judge to proceed on the disclosures thus made. If on such disclosures, it appears that only one verdict could be rendered, that is, that there is no

[6] Americans Ins. Co. vs. Gentile Bros. Co., 109 Fed. (2) 732; Town of River Junction, et al. vs. Maryland Cas. Co., 110 Fed. (2) 278; MacPherson vs. Schram, 112 Fed. (2) 674; Whitaker vs. Coleman, 115 Fed. (2) 305; Board of Public Instruction vs. Meredith, et al., 119 Fed. (2) 712.

disputed issue of fact, it is then the duty of the judge to enter judgment in accordance with the showing made. It will serve no useful purpose to enter into an analysis of the supporting proofs offered by the movant. It is sufficient to say that they establish without contradiction or question of any kind that in the early years of the field involved in this suit, there was a market price for the gas at the well, and that that market price was never at any time during any of the years in question in excess of the 3 cents which defendant consistently paid plaintiffs. If, on a trial to a jury, the evidence should show this, it would be the duty of the judge to direct a verdict for defendant. It was his duty, therefore, on the motion for summary judgment to bring the matter to a close by entering judgment on the motion. The judgment is

Affirmed.

[fol. 112]

JUDGMENT

No. 10517

Extract from the Minutes of March 29th, 1943

J. M. SARTOR, ET AL.,

versus

ARKANSAS NATURAL GAS CORPORATION

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, J. M. Sartor, and others, and the surety on the appeal bond herein, National Surety Corporation of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 120] ORDER DENYING REHEARING

Extract from the Minutes of May 11th., 1943

No. 10517

J. M. SARTOR, et al.,

versus

ARKANSAS NATURAL GAS CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 121] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 18, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9496)

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UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA.

No. 2387 at Law.

J. M. SARTOR, ET AL,

versus

ARKANSAS NATURAL GAS CORPORATION.

TRANSCRIPT OF APPEAL

Taken by Plaintiffs

TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, NEW ORLEANS, LOUISIANA.

Appearances:

Gilbert P. Bullis, Esquire,
Attorney for Plaintiffs-Appellants.

Messrs. Blanchard, Goldstein, Walker and O'Quin,
Attorneys for Defendant-Appellee.

ORIGINAL PETITION.

In the United States District Court for the Western District of Louisiana, Monroe Division.

J. M. Sartor, et al, Plaintiffs,
vs. No. 2387 At Law.
Arkansas Natural Gas Co., Defendant.

To the Honorable Ben C. Dawkins, Judge of said Court:

This petition of James M. Sartor, and of Frank B. Sartor, and of Daniel R. Sartor, all being citizens and residents of the Parish of Richland and State of Louisiana, plaintiffs herein, respectfully shows:

1.

Petitioners attach hereto and make part hereof a contract entitled "Oil and Gas Lease", and reference is here made to said annexed contract for its full contents.

2.

Petitioners acquired and owned three-fifths of all of the rights of grantors or lessors in said contract, by agreement with said grantors dated Nov. 18, 1926, and recorded in Book 69, page 14, of the records of conveyances of Richland Parish, La.

3.

Natural Gas & Fuel Corporation, grantee or lessee under said contract, was a subsidiary of and owned by Arkansas Natural Gas Company, and on March 20, 1928, was merged with, and conveyed all of its property to said Arkansas Natural Gas Co., by act recorded in Book 56, page 471, of the conveyance records of said Richland Parish, La.

4.

Arkansas Natural Gas Company is a citizen and resident of the State of Delaware, being a corporation organized under the laws of that State, but has a main office and agent for the service of legal process, but has a main office and agent for the service of legal process in the City of Shreveport, La. Said Arkansas Natural Gas Co. is hereinafter called "defendant".

5.

Under and by right of said contract, defendant drilled on said land four wells producing natural gas alone, and produced from and utilized and sold off the premises the following quantities of natural gas, computed at 10 ounces above atmospheric pressure:

In the year 1927	549,607,000	cubic feet;
In the year 1928	3,171,865,000	cubic feet;
In the year 1929	2,926,323,000	cubic feet;
In the year 1930	1,726,679,000	cubic feet;
In the year 1931	1,920,111,000	cubic feet;
In the year 1932	1,214,867,000	cubic feet;
Total	11,509,452,000	cubic feet.

6.

The equivalent quantity of gas, corrected to two pounds above atmospheric pressure, is 10,544,960,000 cubic feet, the ratio of volume of the same quantity of gas; at ten ounce pressure, to that at two pounds pressure being as 1.0000 to .9162.

7.

No open market, or public bidding, and no published prices have ever existed for natural gas in the State of Louisiana, hence its value and market price, to which peti-

tioners are entitled under said contract, could be ascertained only from the sales made by defendant and other producers, which sales have been kept secret and hidden from the public and petitioners.

8.

Plaintiffs have only recently been informed of said sales in November, 1932, and from such information now aver that the value and market price of all of said gas was not less than 6½¢ per thousand cubic feet computed at two pounds above atmospheric pressure, and the amount received by defendant from the sale of said gas was not less than $685,422.40, and petitioners are entitled to three-fifths of one-eighth of said sum, being $51,406.69.

9.

Defendant took advantage of its knowledge, and the ignorance of petitioners and their inability of obtain information, to pay to petitioners much less than the sums due them as aforesaid, the total payments to petitioners being only $21,999.75, leaving a balance due petitioners of $29,406.94, which is wholly due, owing and unpaid to petitioners.

10.

In making payments to petitioners, defendant deducted three-fifths of one-eighth of the severance tax due to the State of Louisiana on said gas, said deduction amounting to $1726.41.

11.

Under said contract, petitioners never had any ownership or control of said gas, hence owed no severance tax.

12.

Petitioners reserve the right to claim in other proceedings their claims for gasoline extracted from said gas, and all claims for gas taken since Jany. 1, 1933.

Wherefore petitioners pray that defendant be cited to answer hereto, and after due proceedings, that there be judgment in favor of petitioners, in the proportion of one-third to each, and against defendant, in the full sum of $29,406.94, with interest on said sum at the rate of 5% per annum from the average date when said gas was produced, until paid, and all costs of this suit; pray for all necessary orders and for general relief.

G. P. BULLIS,
Attorney for Petitioners.

Filed March 20, 1933.

4 P-1.

Oil and Gas Lease.

Agreement, Made and entered into 7th day of March, 1927, by and between E. A. Sartor, married but once and then to Addie May Lane, with whom he is now living, of Caddo Parish, La., and F. B. Sartor, married but once and then to Earline Williams with whom he is now living, of Richland Parish, La., party of the first part, hereinafter called lessor (whether one or more,) and Natural Gas & Fuel Corporation, of El Dorado, Arkansas, party of the second part, lessees.

Witnesseth, That the said lessor, for and in consideration of Seventeen thousand five hundred Dollars, cash in hand paid, and other good and valuable considerations, receipt

of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the lessee to be paid, kept and performed, has granted, demised, leased and let, and by these presents does grant, demise lease and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, and laying pipe lines, and building tanks, power stations and structures thereon to produce, save and take care of said products, all that certain tract of land situated in the Parish of Richland, State of Louisiana, described as follows, to-wit:

N½ of NE¼ and SE¼ of NE¼ all in Section 24, Twp. 16 North, Range 5 East; and fractional S½ of SW¼ lying north and west of Boeuff River and fractional NE¼ lying north of Boeuff River, all in Section 19, Twp. 16 North, range 6 East; and N½ of SW¼ and NE¼ of SE¼ and SW¼ of SE¼, all in Section 18, Twp. 16 North, Range 6 East; and fractional N½ of SW¼ lying north of Boeuff River in Section 20, Twp. 16 North, range 6 East; and containing 500.5 acres, more or less.

It is agreed that this lease shall remain in force for a term of 5 years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

In consideration of the premises the said lessee covenants and agrees:

1st. To deliver to the credit of the lessor, free of cost, in the pipe line to which he may connect his wells, the equal one-eighth part of all oil produced and saved from said leased premises.

2nd. To pay the lessor two hundred dollars each year for each well producing gas only, until such time as the

gas shall be utilized or sold off the premises, and at that time the royalty above named shall cease, and thereafter the grantor shall be paid one-eighth (1/8) of the value of such gas calculated at the rate of market price and no less than three cents per thousand cubic feet, corrected to two pounds above atmospheric pressure, and lessor to have gas free of cost from any such well for all stoves and inside lights in the principal dwelling house on said land during the same time by making his own connections with the wells at his own risk and expense.

3rd. To pay lessor for gas produced from any oil well and used off the premises or for the manufacture of casinghead gasoline, one-eighth net proceeds, for the time during which such gas shall be used, said payments to be made each three months in advance.

If no well be commenced on said land on or before the 7th day of March, 1928, 19...., this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, or to the lessor's credit in the Richland State Bank at Rayville, La., which bank and its successors are the lessor's agent and which shall continue as the depository regardless of changes in the ownership of said land, the sum of five hundred & no/100 Dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for 12 months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privileges granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above described land be a dry hole, then, and in that event if a second well is not commenced on said land within twelve months from the expiration of the last rental period for which rental has been paid, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as above provided, that the last preceding paragraph hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there has been no interruption in the rental payments.

The lessee shall have the exclusive right to take all waste oil, from its own wells, or coming on this property from other sources, and agrees to pay to lessor an equal one-eighth thereof, if utilized.

If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which their interest bears to the whole and undivided fee.

Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for its operations thereon, except water from wells of lessor.

When requested by lessor, lessee shall bury its pipe lines below plow depth.

No well shall be drilled nearer than 200 feet to the house or barn now on said premises, without the written consent of the lessor.

Lessee shall pay for damages caused by its operations to growing crops on said land.

Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is hereby expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors, or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment, or a true copy thereof; and it is hereby agreed in the event this lease shall be assigned as to part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which said lessee or any assignee thereof shall make due payment of said rental.

Lessor hereby warrants and agrees to defend the title to the lands herein described, and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, any mortgage, taxes or other liens on the above described lands, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof.

Notwithstanding anything in this lease contained to the contrary, it is expressly agreed that if lessee shall commence drilling operations at any time while this lease is in force, this lease shall remain in force and its term shall continue so long as such operations are prosecuted and, if

production results therefrom, then as long as such production continues. As a further consideration for the above described lease, the lessee binds and obligates itself to pay to lessor the additional sum of five thousand and no/100 dollars ($5000.00) payable from seven-sixteenths (7/16ths) of the first (1st) oil produced, run and marketed from the above described property.

In testimony whereof we sign, this the 7th day of March, 1927.

E. A. SARTOR, (Seal)
F. B. SARTOR. (Seal)

Witness:
J. M. SARTOR,
G. D. CAIN.

State of Louisiana,
Parish of Caddo.

Before me, Nash Johnson, Notary Public in and for Caddo Parish, Louisiana, on this 8th day of March, 1927, personally came and appeared E. A. Sartor, who in the presence of me, said authority, and James U. Galloway and J. D. Jones, competent witnesses, declares and acknowledges that he is the identical person who executed the foregoing instrument in writing, that his signature thereto is his own true and genuine signature, and that he executed said instrument of his own free full, and for the purposes and considerations therein expressed.

Thus done and passed on the day and date hereinabove written, in the presence of the before named and undersigned competent witnesses, who have hereunto subscribed

their names, together with said appearer, and me, said Notary, after reading the whole.

E. A. SARTOR.

Witnesses:
JAMES U. GALLOWAY,
J. D. JONES.

NASH JOHNSON,
Notary Public.

State of Louisiana,
Parish of Richland,

Before me, the undersigned authority, this day personally appeared J. M. Sartor, to me personally known to be the identical person whose name is subscribed to the foregoing instrument as an attesting witness, who being first duly sworn, on his oath, says: That he subscribed his name to the foregoing instrument as a witness, and that he knows F. B. Sartor, the Grantor named in said instrument, to be the identical person described therein, and who executed the same, and saw him sign the same as his voluntary act and deed, and that he, the said J. M. Sartor, subscribed his name to the same at the same time as an attesting witness.

J. M. SARTOR.

Sworn to and subscribed before me, this 7th day of March, 1927.

J. C. SALMON,
Notary Public in and for Richland Parish, Louisiana.

Filed March 20, 1933.

5

ANSWER.

(Title of Court and Case Omitted.)

No. 2387.

Now comes Arkansas Natural Gas Company, made defendant herein, and, with full reservation of its rights under the exception of no cause of action heretofore filed by it, answers plaintiffs' petition as follows:

1.

Paragraph one is denied for lack of information as to whether or not petitioners actually attached to the original petition in this case the oil and gas lease referred to.

2.

Paragraph two is likewise denied for lack of information; and it is specially averred that if the instrument referred to in paragraph two of plaintiffs' petition had as between the parties thereto the effect for which plaintiffs contend, no notice of the execution or existence of such instrument has been given to the defendant as required by the lease upon which plaintiffs base their cause of action.

3.

The allegations of paragraph three of plaintiffs' petition are admitted.

4.

The allegations of paragraph four of plaintiffs' petition are admitted.

5.

The allegations of paragraph five of plaintiffs' petition are admitted.

6.

The allegations of paragraph six of plaintiffs' petition are admitted.

7.

Paragraph seven as written is denied; and it is especially denied that defendant has kept "secret and hidden" from petitioners anything as to which petitioners were entitled or even desired to be informed. It is admitted, however, that there has never been any public bidding or published prices for natural gas in Louisiana, it not being the custom to establish prices for natural gas in that manner; but defendant avers that the value of the gas produced from the lease described in paragraph one of plaintiffs' petition based on the generally recognized fair market price for natural gas in the Richland field was three cents (3¢) per thousand cubic feet computed at two pounds above atmospheric pressure, this being the price at which the pipe line companies which bought the bulk of the gas from the producers were accustomed to pay and did generally pay to the producers throughout the field.

Further answering paragraph seven defendant avers that at the time this lease was entered into and throughout the period of production of gas from the lands covered by it three cents (3¢) per thousand cubic feet computed at two pounds above atmospheric pressure was the price generally paid royalty owners both in the Richland Field and in the Monroe Field which is only a few miles distant from it, it being generally recognized by lessors

and lessees alike both as the prevailing market price and as the price likely to prevail during the life of the Richland Field.

Further answering paragraph seven of plaintiffs' petition, defendant avers that when the aforesaid lease was entered into it was the intention of the parties thereto that until another general and average market price should be established for gas produced and sold in the Richland Field three cents (3¢) per thousand cubic feet computed at two pounds above atmospheric pressure should be the market price at which the lessors' one-eighth (1/8th) royalty on gas should be paid for by the lessee.

8.

The allegations of paragraph eight of plaintiffs' petition are denied.

9.

The allegations of paragraph nine of plaintiffs' petition are denied.

10.

The allegations of paragraph ten of plaintiffs' petition are admitted.

11.

Paragraph eleven of plaintiffs' petition states merely a conclusion of law; that is, nevertheless, denied.

12.

Paragraph twelve of plaintiffs' petition being merely a statement of plaintiffs' intention, is neither admitted nor denied.

13.

Your respondent further shows that during the entire term of the aforesaid lease your respondent has made monthly reports to its lessors A. E. Sartor and F. B. Sartor as to the amount of gas utilized by respondent off the leased premises and your respondent has paid its lessors one-eighth of the value of said gas calculated at the price of three cents (3¢) per thousand cubic feet corrected to two pounds above atmospheric pressure, which monthly statements and settlements were received and accepted by your respondent's lessors as being in accordance with the terms of the lease and as being a full compliance by respondent with its obligations from month to month under the lease; and your respondent especially avers that the monthly reports, settlements and payments made by it were in accord with the meaning of the lease contract as intended, understood and construed both by it and by its lessors.

14.

As to all demands of plaintiffs for royalties claimed to be due them or any of them from gas produced and utilized or sold off the leased premises prior to March 21st, 1930, your respondent especially pleads that this action has prescribed under Article 3538 of the Revised Civil Code.

15.

Further answering, respondent shows that in the oil and gas lease described in paragraph one of plaintiffs' petition it was agreed that the lessee should pay the lessor for gas produced from any oil or gas well and used for the manufacture of casinghead gas one-eighth of the net proceeds for the time during which such gas should be used.

16.

That through an error on the part of your respondent's employees your respondent, beginning with the month of January, 1928, has paid to A. E. Sartor and F. B. Sartor, lessors under the aforesaid lease—not one-eighth of the net proceeds of the gas used for the manufacture of casinghead gas—but one-eighth of the gross proceeds, resulting in a large overpayment to the said A. E. Sartor and F. B. Sartor on this score.

17.

That the amount of such overpayment to F. B. Sartor was at least Two Thousand Ninety-four and 76/100 ($2,094.76). Dollars, which amount your respondent is entitled to recover back as having been paid to the said F. B. Sartor in error.

18.

In the alternative, and only if it should be finally determined that the agreement described in paragraph two of plaintiffs' petition was effective as to your respondent without service of a copy thereof or written notice thereof as required by the terms of the lease, then and in that event your respondent shows the plaintiffs James M. Sartor and Daniel R. Sartor must have received the benefits of the error of your respondent's employees in settling for the proceeds of gas used for the manufacture of casinghead gas to the extent of one-fifth (1/5) each of such overpayment, which overpayment as to each of them was Eight Hundred Thirty-seven and 90/100 ($837.90) Dollars.

Wherefore, your respondent prays that the plea of prescription be sustained; that the demands of plaintiffs against it be rejected in toto and at their cost; and that

respondent do have and recover judgment against F. B. Sartor in reconvention in the full sum of Two Thousand ninety-four and 76/100 ($2,094.76) Dollars, together with interest at the rate of five per cent (5%) per annum from date of filing this answer until paid.

Your respondent further prays that plaintiffs be condemned to bear the cost of this proceeding.

In the alternative and only if it should be finally determined that the agreement described in paragraph two of plaintiffs' petition was effective as to your respondent without service of a copy thereof or written notice thereof as required by the terms of the lease, then and in that event your respondent further prays that it do have and recover judgment against James M. Sartor in reconvention in the full sum of Eight Hundred Thirty-seven and 90/100 ($837.90) Dollars and against Daniel R. Sartor in reconvention in the full sum of Eight Hundred Thirty-seven and 90/100 ($837.90) Dollars together with interest at the rate of five per cent (5%) per annum from the date of filing this answer until paid.

W. H. ARNOLD,
BLANCHARD, GOLDSTEIN,
WALKER AND O'QUIN,
Attorneys for Respondent.

Filed Nov. 5, 1933.

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10 VERDICT OF JURY.

"We, the Jury, find for the plaintiff fixing the market price of gas at 4½ cents for 1927 to 1932 inclusive. Said price to be paid at point of delivery.

We, the Jury, further find the plea of prescription not good.

JOHN B. PITTMAN,
Foreman.

Filed April 20, 1934.

11 JUDGMENT.

No. 2387.

In this case in accordance with the verdict of the jury,

It is Ordered, Adjudged and Decreed that the plaintiffs James M. Sartor, Frank B. Sartor and Daniel R. Sartor do have and recover judgment, in the proportion of one-third each, against the defendant Arkansas Natural Gas Company in the full sum of nine thousand four hundred ninety & 46/100 Dollars, together with interest on said sum at the rate of five per cent (5%) per annum from March 21st, 1933, until paid, and all costs of this suit.

In further accordance with the verdict of the jury, it is Ordered, Adjudged and Decreed that the plea of prescription of three years liberandi causa filed by the defendant be and it is hereby overruled.

The law being in favor thereof; it is Ordered, Adjudged and Decreed that the plaintiffs' exception of vagueness filed with relation to the defendant's reconventional demand be sustained and that the defendant's reconventional demand be rejected as in case of nonsuit, with reservation to the defendant of the right to renew the demand in a separate proceeding.

It is further Ordered and Decreed that the plaintiffs' demand for a refund of the severance tax be and it is hereby rejected.

Thus done, read and signed in open Court on this 15 day of May, 1934.

BEN C. DAWKINS,
Judge.

Filed May 15, 1934.

12 MANDATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

The President of the United States of America.

To the Honorable the Judge of the District Court of the United States for the Western District of Louisiana—Greeting:

(Seal)

Whereas, lately in the District Court of the United States for the Western District of Louisiana, before you, in a cause between J. M. Sartor, and others, plaintiffs, and Arkansas Natural Gas Company, defendant, No. 2387, at law, wherein the judgment of the said District Court entered in said cause on the 15th day of May, A. D. 1934, was partly in favor of said plaintiffs, and partly against Arkansas Natural Gas Company, defendant, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Arkansas Natural Gas Company, and a cross-appeal sued out by James M. Sartor, et al, agreeably to the Act of Congress, in such case made and provided fully and at large appears.

And whereas, in the present term of November in the the year of our Lord one thousand nine hundred and thirty-four, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On Consideration Whereof: It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court on the direct appeal in this cause be, and the same is hereby, reversed; and that this cause be, and

it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further Ordered and Adjudged that the judgment of the said District Court in this cause on the cross-appeal be, and the same is hereby, affirmed;

It is further Ordered and Adjudged that the appellees and cross-appellants, James M. Sartor, and others, and the surety on the cross-appeal bond herein, American Surety Company, of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

August 23rd, 1935.

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13 EXTRACT FROM THE MINUTES OF FEBRUARY 25th, 1935.

Arkansas Natural Gas Company

vs. No. 7467.

James M. Sartor, et al

On consideration of the motion of Mrs. Earline W. Sartor, as Administratrix of the Succession of Frank B. Sartor, deceased, and the exhibit attached thereto, it is Ordered that Mrs. Earline W. Sartor, Administratrix of the Succession of Frank B. Sartor, deceased, be substituted as a party appellee in this cause in the place of Frank B. Sartor, one of the appellees, deceased.

James M. Sartor, et al,

vs. No. 7522.

Arkansas Natural Gas Company.

On consideration of the motion of Mrs. Earline W. Sartor, as Administratrix of the Succession of Frank B. Sar-

tor, deceased, and exhibit attached thereto, it is Ordered that Mrs. Earline W. Sartor, Administratrix of the Succession of Frank B. Sartor, deceased, be substituted as a party cross-appellant in this couse in the place of Frank B. Sartor, one of the cross-appellants, deceased.

You, Therefore, Are Hereby Commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal and cross-appeal notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, the Seventh day of October, in the year of our Lord one thousand nine hundred and thirty-five.

OAKLEY F. DODD,
Clerk, U. S. Circuit Court of Appeals for the Fifth Circuit.

Filed October 8, 1935.

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14 VERDICT OF THE JURY.

"We, the Jury, find for the Plaintiffs that the average price of gas at the well in Richland Parish, Louisiana, field during the period beginning March 20, 1930, and ending March 20, 1933, to be .0445 per 1000 cu. ft. at 8 oz. pressure.

D. M. KELL,
Foreman.

Oct. 14, 1937.

Filed Oct. 15, 1937.

United States District Court, Western District of Louisiana, Monroe Division.

James M. Sartor, et al.,
vs. No. 2387 At Law.
Arkansas Natural Gas Company.

This case having been duly heard, argument had on the motion of defendant for a directed verdict and on the plea of prescription of three years, liberandi causa, filed by the defendant, the law and the evidence being in favor thereof,

It is Ordered, Adjudged and Decreed that the plea of prescription of three years, liberandi causa, filed by the defendant be and it is hereby sustained and plaintiffs' demands rejected as to all demands for additional payments on gas produced prior to March 20th, 1930.

In accordance with the verdict of the jury in this case, it is Ordered, Adjudged and Decreed that the plaintiffs, James M. Sartor, Daniel R. Sartor and Mrs. Earline Sartor, administratrix of the succession of Frank B. Sartor, deceased. do jointly have and recover judgment against the defendant, Arkansas Natural Gas Company, in the full sum of Three Thousand Eight Hundred Fifty-two and 92/100 Dollars, with interest at the rate of five per cent (5%) per annum from March 20th, 1933, until paid and all costs of this suit.

It is further Ordered, Adjudged and Decreed that the motion for a directed verdict as to defendant's reconventional demand be likewise sustained and that defendant do have and recover judgment against James M. Sartor, Daniel R. Sartor and Mrs. Earline Sartor, administratrix of the succession of Frank B. Sartor, deceased, jointly, in the sum of Three Thousand Five Hundred Forty-seven and

35/100 ($3,547.35) Dollars, with interest at the rate of five per cent (5%) per annum from September 13th, 1937, until paid.

This done, read and signed at chambers at Shreveport, Louisiana, all parties consenting to the signing of the decree at chambers, on this 30th day of December, 1937.

BEN C. DAWKINS,
Judge.

Filed January 7, 1938.

United States Circuit Court of Appeals for the Fifth Circuit.

The President of the United States of America.

To the Honorable the Judge of the District Court of the United States for the Western District of Louisiana—Greeting:

(Seal)

Whereas, lately in the District Court of the United States for the Western District of Louisiana, before you, in a cause between James M. Sartor, and others, plaintiffs, and Arkansas Natural Gas Company, defendant, No. 2387, At Law, wherein the judgment of the said District Court entered in said cause on the 30th day of December, A. D. 1937, was partly in favor of James M. Sartor, and others, plaintiff, and partly in favor of Arkansas Natural Gas Company, defendant, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of appeals sued out by Arkansas

Natural Gas Corporation and James M. Sartor, et al, agreeably to the Act of Congress, in such case made and provided, fully and at large appears,

And Whereas, in the present term of November in the year of our Lord one thousand nine hundred and thirty-seven, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed so far as the verdict of the jury fixed the market value of the gas upon which plaintiff is entitled to recover royalties and so far as the Court determined the amount due in reconvention; and that the judgment of the said District Court in this cause as to the amount determined by the Court to be due plaintiffs be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment in conformity with the opinion of this Court;

It is further Ordered and Adjudged that the appellant, Arkansas Natural Gas Corporation, and the surety on its appeal bond herein, The Fidelity and Casualty Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

August 10, 1938.

You, Therefore, Are Hereby Commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeals notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, the 20th day of December, in the year of our Lord one thousand nine hundred and thirty-eight.

(S.) OAKLEY F. DODD,
Clerk, U. S. Circuit Court of Appeals for the Fifth Circuit.

Filed December 21, 1938.

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19 JUDGMENT.

(Title Omitted.)

In this suit, judgment having been rendered by this Court on December 30th, 1937, and said judgment having been affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, on appeal, and being now final and res adjudicata on all issues therein adjudged, except as to the claims made by plaintiff for gas produced prior to March 20th, 1930, as to which claims said Court of Appeals remanded this case to this Court for further proceedings; and this Court having considered said claims; for reasons assigned in written opinion herein filed dated September 14th, 1939, it is

Ordered, Adjudged and Decreed, that all claims of plaintiffs herein for additional payments as royalty for gas produced prior to March 20, 1930, are barred by the prescription of three years established by Article 3538 of the Civil Code of Louisiana.

Rendered, Read and Signed in open Court at Monroe, La., this 23 day of October, 1939.

BEN C. DAWKINS,
United States District Judge.

Filed Oct. 23, 1939.

No. 2387.

United States Circuit Court of Appeals for the Fifth Circuit.

The President of the United States of America.

To the Honorable the Judge of the District Court of the United States for the Western District of Louisiana—Greeting:

(Seal)

Whereas, lately in the District Court of the United States for the Western District of Louisiana, before you, in a cause between James M. Sartor, and others, plaintiffs, and Arkansas Natural Gas Corporation, defendant, No. 2387, at Law, wherein the judgment of the said District Court entered in said cause on the 23rd day of October, A. D. 1939, was in favor of said defendant, and against James M. Sartor, and others, plaintiffs, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by James M. Sartor, et al, agreeably to the Act of Congress, in such case made and provided, fully and at large appears,

And Whereas, in the present term of November in the year of our Lord one thousand nine hundred and thirty-nine, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court, with directions to proceed in accordance with our mandate in appeal cause, No. 8770;

It is further Ordered and Adjudged that the appellee, Arkansas Natural Gas Corporation, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

May 16, 1940.

"Sibley, Circuit Judge, concurring specially."

You, Therefore, Are Hereby Commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, the 10th day of July, in the year of our Lord one thousand nine hundred and forty.

OAKLEY F. DODD,
Clerk, U. S. Circuit Court of Appeals for the Fifth Circuit.

Filed July 11, 1940.

22 MOTION FOR SUMMARY JUDGMENT.

(Title Omitted.)

Now comes Arkansas Natural Gas Corporation, defendant herein, and with respect shows that all issues in this case have been disposed of except with regard to the settlement between the plaintiffs and the defendant for gas produced and sold during the period beginning at some time in the year 1927 and ending March 19th, 1930.

Defendant further with respect shows that there exists no reasonable basis for dispute as to what was the market price at the well for gas produced during the period beginning with the year 1927 and ending March 19th, 1930, there having been during this period a market at the well for such gas with an established price of three cents (3¢) per MCF calculated at two pounds (2#) above atmospheric pressure. The plaintiffs are here suing for royalties claimed by them to be due over and above those paid them upon the theory that the market price of gas in the Richland Parish field during the period referred to exceeded 3¢ per MCF.

Defendant further with respect shows that of the oil and gas leases granted on lands in and adjacent to the Richland gas field and filed for record in the office of the Clerk of Court of Richland Parish, Louisiana, considerably more than 90% thereof stipulated that the lessee should be bound to pay to the lessor a royalty on the gas produced on the basis of 3% per MCF calculated at two pounds above atmospheric pressure and that in practically all of the cases where a higher price for royalty gas than 3¢ per MCF was paid or agreed to be paid the increase in the price was the result of a compromise between the lessor and the lessee of a dispute concerning the continued existence of the lease, the higher price being paid to the

lessor in order to induce him to abandon the dispute; and that substantially all of the gas that was sold by independent operators and well owners in the Richland field was sold at the price at the well of 3¢ per MCF or less. Among these independent operators who made such sales in the open market at the well and thus aided in establishing a market price for gas at the well in the Richland Parish field were the Ruston Drilling Company, which on August 5th, 1927, entered into a contract with the Natural Gas & Fuel Corporation; T. L. James, who on September 20th, 1928, entered into a contract with the Richland Gas Company; Richland Operating Company, which on July 27th, 1927, entered into a contract with the Centry Carbon Company; Franklin Oil & Gas Company, Inc., which on March 3rd, 1930, entered into a contract with International Gas Products, Inc.; W. C. Feazel, et al, who on April 18th, 1930, entered into a contract with International Gas Products, Inc. A number of other contracts were entered into by independent operators and well owners at 3¢ or less per MCF; but these contracts were entered into subsequent to April 19th, 1930, and for that reason only are not listed here.

Defendant further with respect shows that the Union Producing Company and its predecessors in title and associated and affiliated corporations maintained during the entire period heretofore referred to in the Richland field a market for gas at the well at the price of 3¢ per MCF, less a charge of ¾¢ per MCF for compression when, as and if compression should be required in order to make deliveries of gas into the field gathering system of the vendee, and that the price of 3¢ per MCF was considered by all producers of gas operating in the Richland gas field from the time that the field was opened until it ceased to produce, and at all times during the period heretofore referred to, to be the market price or value of gas delivered at the well.

Defendant further with respect shows that it has been determined by the Supreme Court of Louisiana in the case of Mrs. Janie May Sartor, et al, vs. United States Gas Public Service Company, No. 34,131 on the docket of that Court, the opinion of the Court being reported in 186 La. 555, 173 So. 193; that the market price at the well in the Richland Parish field did not at any time exceed 3¢ per MCF and that under the law of Louisiana the landowners who had stipulated for royalties based on market price at the well were not entitled to be paid on the basis of the prices stipulated in the so-called pipe line contracts upon which the plaintiffs here relied; and the Court further held that the highly onerous obligations assumed by the sellers in the pipe line contracts such as, for example, the obligations to deliver specified annual minimum amounts of gas to the buyer and to be prepared to deliver up to twice this amount at the buyer's option, together with the expense of maintaining gathering systems, installing meters, keeping accounts, etc., were worth at least the difference between the prices stipulated in the pipe line contracts and 3¢ per MCF at the wellhead.

In this connection defendant points out that the prices stipulated in the pipe line contracts were on an advancing scale, the lowest prices being for the first two or three years, as the case might be, and higher prices being required during subsequent years, so that even under these pipe line contracts the prices paid for gas during the period heretofore referred to were lower than the prices required to be paid during subsequent years.

Defendant further with respect shows that the Richland field was only a few miles distant from the Monroe field, which was a much larger field and was producing gas in larger quantities before the Richland field was discovered and is still producing gas in large quantities; that the price of gas at the well in the Richland field was largely

influenced and determined by the price of gas at the well in the Monroe field; that there has at all times been a market at the well for gas in the Monroe field at the price of 3¢ per MCF computed on a pressure basis of two pounds above atmospheric pressure; and that this price has been generally recognized to be the prevailing and settled market price of gas at the well in both the Monroe and Richland fields.

Defendant further with respect shows that the averments of fact set forth in this motion are accurate and correct beyond dispute and that there can be no substantial issue of fact with regard to these averments; and in support of this motion defendant hereto annexed a number of affidavits of persons of the highest credibility and with the most comprehensive information concerning the production of gas from the Richland gas field during the period referred to and the maintenance of a wellhead market in that field and the established price of 3¢ per MCF for gas at the well in the Richland field.

Defendant further with respect shows that the bulletins issued by the United States Department of Commerce, Bureau of Mines, dealing with natural gas during the years 1927, 1928, 1929 and 1930, and particularly those portions of said bulletins which give the average prevailing wellhead price of gas in the State of Louisiana for the period referred to so that the average wellhead price of gas at the well in the State of Louisiana during the aforesaid period was 3¢ per MCF or less.

Wherefore, defendant prays that a summary judgment be granted herein in its favor declaring that the wellhead price of gas produced in the Richland Parish field during the period beginning with the year 1927 and ending March 19th, 1930, was not more than 3¢ per MCF and that accordingly the demands of plaintiffs against defendant for

royalties on gas produced during such period in excess of the royalty based on a market price of 3¢ per MCF which has heretofore been paid them be rejected at their cost.

In the alternative only, defendant prays that this Honorable Court find and determine such facts as are material to the issues yet remaining in this cause as to which no substantial controversy exists.

(S.) H. C. WALKER, JR.,
424 First National Bank Building,
Shreveport, Louisiana.

(S.) ELIAS GOLDSTEIN,
Attorneys for Defendant.
424 First National Bank Building,
Shreveport, Louisiana.

I hereby certify that a copy of the above and foregoing motion and of all the annexed affidavits and exhibits have been served on Mr. G. P. Bullis, counsel for plaintiffs, by mailing same to him at Vidalia, Louisiana.

This 1st day of April, 1942.

(S.) ELIAS GOLDSTEIN,
Of Counsel for Defendant.

Filed April 3, 1942.

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27 ORDER.

Upon consideration of the above and foregoing motion and the documents thereto annexed,

It is Ordered that a hearing be had upon the defendant's motion for summary judgment on the 16 day of April, 1942, at ..... M. in the United States Court Room at

Monroe, Louisiana; and that notice of the date of such hearing be given immediately to counsel for both plaintiffs and defendant.

This 3rd day of April, 1942.

(S.) BEN C. DAWKINS,
Judge, United States District Court.

Filed April 3, 1942.

ANSWER TO MOTION FOR SUMMARY JUDGMENT.

28 (Title Omitted.)

Now comes J. M. Sartor, et als, plaintiffs in the above entitled case, and answers defendant's motion for summary judgment, as follows:

1.

Summary judgment in this case is absolutely impossible for the following reasons:

(a). All of the facts and issues in this case have been twice submitted to a jury of 12 men, under instructions from the Court, and have been twice decided in favor of plaintiffs by said juries;

(b). Every fact, and every witness, and every claim and every document in or attached to defendant's motion for summary judgment, has been twice submitted to a jury of twelve men in this very case, and has been twice rejected and held to be worthless and unfounded by said juries;

It is therefore impossible now to claim that these issues are favorable to defendant, and far more, that they are so favorable to defendant that they present no genuine issue as to any material fact favorable to plaintiffs.

2.

On the last trial of this case, on October 14, 1037, the jury found the market price of natural gas to which plaintiff is entitled in this suit, for gas produced on March 20, 1930, to be 4.45¢ per MCF; defendant, in this motion for summary judgment, asks this Court to hold that the market price on March 19, 1930, was less than 3¢, and that this market price is so clear and certain that there is no substantial controversy to the contrary. Such a claim, asking the Court to hold that the market price of gas on March 19, 1930, was 3¢, and on March 20, 1930, was 4.45¢, is frivolous and unworthy of the dignity of this Court and not fit for serious consideration.

3.

Plaintiffs specially plead as res adjudicata of all claims made by defendant in its motion for summary judgment, the verdict of the jury on this case on October 14, 1937, and the judgment of this Court in this case on December 30, 1937.

4.

The reasons presented by defendant in its motion for summary judgment are utterly untenable, and frivolous and unworthy of serious consideration, for the following reasons:

5.

The first reason assigned is that numerous leases were made on lands in and adjacent to the Richland gas field

stipulating for a royalty to lessor of 3¢ per MCF for any gas produced under the lease. A lease is a contract whereby a land-owner grants the right to enter on his land for the purpose of drilling for minerals, receiving for said right, a valuable consideration. Hence such a contract is not a sale of gas, and is utterly immaterial and irrelevant to the issue of what was the market price of gas. In leasing land, a land-owner had the opinion of stipulating that any gas produced should yield to him royalty at a fixed sum, such as 3¢ per MCF., or the land-owner could enjoy the benefit of any increase in the value of gas, by stipulating that the royalty should be paid at the market price, whether more or less than 3¢. In the lease at bar, plaintiffs elected to risk the probability that gas would be worth more than 3¢, by stipulating that they should receive the market price. Hence the fact that certain other land-owners elected not to risk or gamble on whether gas would be worth more or less than 3¢, but to accept a fixed sum of three cents, has not the slightest bearing or materiality to the issue of what is the market price to which plaintiffs are entitled, and to permit such evidence to be introduced, is a gross injustice to plaintiffs. Plaintiffs further show that this suit has now been pending almost ten years, and in that time no Court or litigant has shown the slightest reason why leases are admissible in evidence on the subject of market price, or many any answer whatever to the position taken by plaintiffs as above stated. It is a gross injustice to plaintiffs to permit any evidence to be introduced, which plaintiffs show could have not the slightest relevancy, and for which defendant makes no attempt to show any relevancy. Counsel for defendant remains silent under plaintiffs' repeated challenges to show relevancy thereof, showing defendant's bad faith in attempting to use such evidence.

6.

The second reason alleged by defendant for summary judgment is that certain independent operators in the Richland gas field sold gas at 3¢ per MCF or less. Defendant is in bad faith in making this claim, because defendant well knows that these sales were trivial and that almost all the gas produced in the Richmond gas field was sold to large pipe lines, and that a few independent producers could not sell to these pipe lines, because of the small quantity they produced and because the sales to the pipe lines had been closed before they started production, hence these trivial sales were at less than the pipeline price. Defendant enumerates as such sales, first, a sale by Ruston Drilling Co. to Natural Gas & Fuel Co. on Aug. 5, 1927. Defendant well knows that this was merely a sale of a small quantity of gas to be used in drilling wells, and only a trivial amount of gas was sold under this contract, and that the price at which this gas was sold was not 3¢ per MCF at 2 lb. pressure, but was a higher price. Second, defendant enumerates a sale by T. L. James & Co. on Sept. 20, 1928, to Richland Gas Company. This sale was far in excess of 3¢ per MCF at 2 lb. pressure. Next defendant enumerates a sale by Richland Operating Co. to Century Carbon Co. on July 27, 1927; this was not for delivery in the Richland Gas field, and did not stipulate a price of 3¢ per MCF at 2 lb. pressure as falsely stated by defendant in its motion, but was a complicated contract for the establishment of a carbon black plant. Next defendant enumerates a contract between Franklin Oil & Gas Co. and International Gas Products Co. on March 3, 1930. This was not made until March 30, 1930, and only a trivial amount of gas was sold.

The bad faith of defendant in this contention is shown by the fact that defendant well knows that the sales stated by them are not only above the price stated (except as to

the last sale), but are also only a trivial part of the whole sales in the Richland gas field, and that during the period of these sales, defendant itself was buying gas at far higher prices than these sales, and that practically all of the gas sold in the field was being sold at far higher rates, all of which defendant omits in bad faith from its motion.

7.

Defendant next claims that the Union Producing Co. and its predecessors in title maintained during the entire period here involved, a market for gas at the well of 3¢ per MCF for gas in the Richland Gas Field. This statement is false and untrue, and plaintiffs claim that defendant cannot produce a shred of evidence to sustain such a statement of fact.

8.

Next defendant claims that the Supreme Court of Louisiana held in a cited case that 3¢ per MCF was the market price of gas in the Richland gas field. This is correct, but defendant failed to state that this decision was based on the facts adduced on the trial of that case, which are vastly different from the facts adduced on the trial of the case at bar, and that decision on facts in one case does not settle the facts in another case because each case has to be decided on the evidence in its own case.

Defendant also omits from its statement the well known fact that six juries in this Court (two in the case at bar), being a total of 72 intelligent and well-qualified jurors, have unanimously decided that the market price of gas in the Richland gas field is more than 3¢ per MCF.

9.

Defendant next contends that the prices in the Monroe Gas Field did not exceed 3¢? Defendant is in bad faith

in this claim, because defendant well knows that this Court has repeatedly ruled, in this case, that sales outside of Richland Parish are not relevant to the issues in this case.

10.

Defendant next contends that the affidavits annexed to its motion are correct. Plaintiffs annexed to this answer, affidavit showing in detail the incorrectness and error of these affidavits, which annexed affidavit is made part of this annswer.

Plaintiffs further show that the affidavits annexed to defendant's motion should be stricken from the record, because they do not conform to the rules of this Court, especially Rule 56 (e) of the Rules of Civil Procedure, that affidavits shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. Plaintiff shows that much of said evidence is hearsay testimony purporting to be statements of statements made by other parties; that said affidavits are mainly expressions of opinion by the affiant, and affiant is not shown to be qualified to express an opinion, and plaintiffs have not been afforded their right to cross examine said witnesses as to their competency to express opinion, hence all of said opinions are inadmissible.

Plaintiffs further show that almost all of the facts and sales recited in the affidavits annexed to defendant's motion are immaterial and irrelevant because they occurred after the period involved in this proceeding, which is from the year 1927 to March 20, 1930, and are oral testimony regarding contents of written documents.

Plaintiffs therefore move that the affidavits attached to defendant's motion be stricken from the record. Plain-

tiffs further show that said affidavits are in bad faith for the reasons above stated.

11.

Defendant next annexes to its motion a bulletin alleged to be issued by the U. S. Bureau of Mines, purporting to show that the average market price of gas in the State of Louisiana is 3¢ per MCF. Defendant well knows that this document is inadmissible in evidence because entirely unauthenticated and with no proof whatever of its genuineness, and for the further reason that this Court has repeatedly ruled that the only evidence on market price admissible in this case is for sales within the Richland field, hence a statement of sales all over the State of Louisiana has no bearing whatever on the issue in this case, and merely cumbers the record, and is entirely inadmissible.

12.

On May 10, 1929, defendant itself made written contracts to buy, and did actually buy and receive, immense quantities of gas for delivery within the Richland gas field at the price of 4½¢ per MCF at 8 ounce pressure, which sales and deliveries continued until long after March 20, 1930.

13.

In the years 1928 and 1929, many pipe lines were built into the Richland gas field, and bought gas in said field, all in excess of the amount paid by defendant to plaintiff, and mostly at prices exceeding 4¢ per MCF.

14.

The sales recited in paragraphs 12 and 13 above, were sales of almost all of the gas produced in the Richland gas field prior to March 20, 1930.

15.

To prove said sales recited in paragraphs 12 and 13 hereinabove, plaintiffs annex hereto and make part hereof an agreed statement of facts, filed in this suit by plaintiffs and defendant jointly on or about April 18, 1934, showing said sales and other matters, said agreed statement being annexed hereto by reference, it being already on file in the record of this case.

16.

All of said sales were well known to defendant, and were proved by admissions of defendant in this case, hence the failure of defendant's motion for summary judgment to mention any of said sales, shows that said motion is made in bad faith and conceals by silence most of the facts in this case.

17.

The undisputed facts in this case, repeatedly proven on trials, are that during the period of time involved in this proceeding, from the year 1927 to March 20, 1930, all sales of gas in the Richland gas field were made at prices more than the amount paid by defendant to plaintiff as the market price of gas, and all of the claims made by defendant in this motion for summary judgment have been rejected, and decided against defendant, by two juries in this case. Said motion for summary judgment is therefore filed in bad faith, because it is impossible under such facts for there to be no genuine issue as to any material fact in favor of a plaintiff who has won before a jury twice on these facts. Even if defendant believes in good faith that the facts stated in its motion for summary judgment entitled defendant to a verdict on he merits, still defendant could not possibly claim that there is no substantial controvesy, or genuine issue regarding them.

18.

Under Rule 56 (g) of the rules of Civil Procedure, plaintiff is entitled to recover damages for said motion for summary judgment filed in bad faith, including attorney's fees. Plaintiffs' attorney has been compelled to defend plaintiffs against said motion, by pleadings and affidavits, and to travel from his home in Ferriday, La., to Monroe, La., and attend Court away from his home, in defense against said motion, and a reasonable fee to attorney for plaintiffs is $500 in this motion.

Wherefore plaintiffs pray that the motion for summary judgment herein filed by defendant is denied and overruled; prays further that there be judgment in favor of plaintiffs and against defendant for $500 attorney's fee for filing of said motion in bad faith; pray for all necessary orders and for general relief.

(S.) G. P. BULLIS,
Attorney for Plaintiffs.

State of Louisiana,
Parish of Concordia.

G. P. Bullis, being by me duly sworn, deposes and says that all of the allegations of fact in the foregoing answer to motion are true and correct.

(S.) G. P. BULLIS.

Sworn to and subscribed before me this 14th day of April 1942.

(S.) B. STUART,
Notary Public.

Filed in Evidence April 20, 1942.

State of Louisiana,
Parish of Concordia.

Before me, the undersigned Notary Public, duly qualified in and for said Parish and State, personally appeared Gilbert P. Bullis, a resident of Ferriday, La., who by me duly sworn, deposes and says as follows:

Affiant was employed as attorney by several land-owners in the Richland gas field, in Richland Parish, Louisiana, early in the year 1931, and continuously from that date to the present time has been actively engaged in litigation regarding the market price of natural gas in that field. Affiant has made a thorough study of the physical features of said field, including the pipe lines serving it, the means of marketing the gas, the location of wells, pipe lines, receiving stations, gasoline extraction plants, carbon black plants, etc. Affiant has also personally read and examined all of the contracts of sale of gas in said field, from the year 1927 to 1935 inclusive, and has examined or cross examined on trials of various lawsuits, almost all of the producers, and all of the leading producers in said field. Affiant has personally conducted in the various Courts, ten trials in the Trial Courts, of lawsuits in which the main issue was what was the market price of natural gas in said field, and has conducted appeals from all but one of said trials, to the Appellate Courts of the United States and the State of Louisiana. Affiant has therefore thoroughly familiarized himself with the market price of natural gas in the Richland gas field.

The clients of affiant, the land-owners in the Richland Gas Field, has never had any knowledge of the market price of gas in that field sufficient for evidence in Court, consequently affiant has been compelled to prove his cases in Court by extracting information from the various defendants in said cases and their officers and agents. It is therefore impossible for plaintiffs in this case to produce

the affidavits of persons expert in the price of gas, on this motion for summary judgment in the suit of J. M. Sartor, et als, vs. Arkansas Natural Gas Co., because all of said persons are hostile to plaintiffs.

Affiant therefore makes this affidavit personally to be filed on behalf of plaintiffs in the suit entitled J. M. Sartor, et als, vs. Arkansas Natural Gas Corporation, No. 2387 on the docket of the United States District Court for the Western District of Louisiana.

This case has been twice tried in said Court before a jury of 12 men. On the first trial, the jury brought in a verdict on April 20th, 1934, the jury brought in a verdict reading as follows:

"We, the jury, find for the plaintiffs, fixing the market price of gas at 4½¢ from 1927 to 1932 inclusive. Said price to be paid at point of delivery."

The judgment on this verdict was reversed by the Court of Appeals, a second trial had, and at this trial the District Court instructed the jury to bring in a verdict only from the period from March 20, 1930, to March 20, 1933. For this period, the jury fixed the market price at 4.45¢ per MCF.

On each of these trials, defendant introduced in evidence before the jury, substantially the same claims as are made in the present motion for instructed verdict, and in each trial the jury unanimously rejected all of these claims.

The only sales of natural gas made for gas produced in the Richland Gas Field, for delivery to the buyer within that field, during the period from the year 1927 to March 20, 1930, as far as is shown by the evidence in all of the

cases tried, including the two trials of the case at bar, are as follows:

Sale by Ouachita Natural Gas Co., et al, to Magnolia Gas Co. dated March 31, 1928, for 3¢ per MCF at 8 oz. pressure;

Sale by Palmer Corporation, et als, to Dixie Gulf Gas Co. dated May 10, 1929, at 3¢ and 4¢ per MCF at 10 oz. pressure;

Sale of Palmer Corp. to Ford, Bacon & Davis, dated Feb. 2, 1926, deliveries in 1927 to 1930, at 4.25¢ per MCF at 10 oz. pressure;

Sale by Palmer Corp, et als, to Mississippi River Fuel Corp., dated Aug. 1, 1929, for 5¢ per MCF at 8 oz. pressure;

Sale by Palmer Corp., et als, to Southern Natural Gas Corp., dated Jan. 15, 1929, for 4½¢ per MCF at 8 oz. pressure;

Sale by Palmer Corp, et als, to Arkansas Natural Gas Co., dated May 10, 1929, at 4½¢ per MCF at 8 oz. pressure;

Sale by Industrial Gas Co. and others to Memphis Natural Gas Co., dated May 24, 1928, for 5¢ at 8 oz. pressure; per MCF;

Sale by Industrial Gas Co. to Southern Gas & Fuel Co., dated Jan. 14, 1928, for 5¢ to 6¢ per MCF at 8 oz. pressure;

Sale by Ruston Drilling Co. to Natural Gas & Fuel Co., dated Aug. 5, 1927, for small quantity of drilling gas at 3¢ per MCF at 10 oz. pressure;

Sale by T. L. James to Richland Gas Co., dated Sept. 20, 1928, for 3½¢ & 4¢ per MCF at 10 oz. pressure.

A few small sales to employees, farm houses, school houses, etc., at prices far above those above stated.

Defendant, Arkansas Natural Gas Corp., paid to plaintiffs 3¢ per MCF at 2 lb. pressure, as the market price of the gas produced from plaintiffs' land during the period from 1927 to March 20, 1930. One thousand cubic feet of gas at 2 lb. pressure contains 10% more gas, and its market price is 10% greater than one thousand cubic feet of gas at 8 oz. or 10 oz. pressure. Hence every one of the above named sales was at a price higher than paid by defendant to plaintiff as market price under the lease sued on in this suit.

Since every sale of gas during the period involved, was at a higher price, and most of them at a vastly higher price, than defendant paid plaintiffs, it is utterly impossible, and frivolous, for defendant to claim, in its motion for summary judgment, that there is no genuine issue, and no substantial controversy, to dispute defendant's claim that the market price was 3¢ at 2 lb. pressure per MCF.

The affidavit of D. W. Harris attached to defendant's motion for summary judgment, contains many statements which are inadmissible in evidence because they are hearsay, and is entirely false and untrue in its statement that the clauses in the contract by which affiant bought gas in the Richland gas field were extraordinary and different from the ordinary contract of sale. The statements of said affiant as to his own personal mental processes of reasoning by which he arrived at a purchased price for gas, are impossible, irrelevant and immaterial, because personal mental process and thoughts are not competent evidence.

The affidavit of S. D. Hunter attached to motion, is irrelevant and immaterial, because none of the sales to which he testifies were made during the period of time

involved in this proceeding, namely, 1927 to March 20, 1930, and for the further reasons that the sales testified to by him were made in a monopolized market, and were trivial in amount.

The affidavit of R. H. Hargrove attached to motion shows that it is not based on the facts contained in the record in this case. Said R. H. Hargrove is Vice-President of Union Producing Co., which has been sued by these plaintiffs on the same cause of action, and by many other land-owners on the same cause of action, as in the suit at bar, consequently his opinion is not fair or unprejudiced. The statements in this affidavit that the contracts for sale of gas to pipe-lines contained unusual or onerous conditions, is an attempt on the part of affiant to testify to the contents of written documents, which [redacted] grossly unfair and legally impossible. The wisdom of the rule of evidence forbidding oral testimony regarding written contracts is shown by the fact that this affiant's testimony regarding the contents of said documents is false and untrue as will be seen from reference to the contents of sale themselves. Said affiant has testified in many cases before juries to the same effect as in his affidavit, and his testimony has been rejected by said juries. As shown hereinabove in this affidavit, said Hargrove's statement of sales is incorrect, and his statement of the weighted average price of sales by his companies is meaningless, because he does not state what is meant by the term "weighted average price". The statement of this affiant that after deducting certain expenses, the net income of the sellers under the pipe line contracts was not in excess of 3¢ per MCF is irrelevant and immaterial, because plaintiffs in this suit are entitled to the market price with no deduction for operating expenses of lessee. The statement that the obligations assumed by the sellers in the pipe line contracts were unique and extraordinary is entirely untrue.

The affidavit of E. N. Florsheim attached to said motion is irrelevant and immaterial because the sale from Richland Operating Co. to Centry Carbon Co. was not an ordinary sale of gas, but was a contract for the erection and supplying of a carbon black plant, and delivery of all gas sold was outside the Richland gas field. The sale from Franklin Oil & Gas Co. to International Gas Products, Inc., testified to by this affiant, was made on March 30th, 1930, being after the period of time involved in these proceedings. The opinion of this witness as to market price of gas is therefore worthless, and the statement of the witness that all operators in the field considered 3¢ to be the prevailing market price, is patently untrue.

The affidavit of R. C. Stokes attached to said motion is contrary to the undisputed evidence in the case at bar.

The affidavit of W. C. Feazel attached to motion, is irrelevant and immaterial because all of the sales testified to, or made by, said affiant were made after March 20, 1930.

The affidavit of C. H. McHenry as to sale to Centry Carbon Co. is irrelevant because said sale was made more than a year after March 20, 1930. The statement of affiant that the sales price of sales to pipe lines was not the market price in the field, is unexplained and inexplicable, since it is obvious that the sales price in bona fide sales is the market price, with no deduction for operating expenses.

The affidavit of R. G. Taylor attached to said motion has been shown to me incorrect, and the expense account grossly "padded" by evidence in other trials, and the books of Hope Producing Co. do not show the figures stated by this affiant.

The opinions expressed by various affiants in these affidavits are not fair and impartial opinions, but are the opinions either of officials of companies being sued on this same cause of action, or of persons doing business with the gas companies and dependent on their favor for a living, and it is grossly unfair and unjust to plaintiffs to permit such opinions to go into the record.

From affiant's long experience and study of the market price of natural gas in the Richland gas field, affiant is of the opinion that said market price was during the year 1927, more than 3¢ per MCF at 2 lb. pressure, and during the years 1928, 1929 and 1930 was more than 5¢ per MCF at 2 lb. pressure, this opinion being based on the sales made for delivery within the Richland gas field during said period.

(S.) G. P. BULLIS.

Sworn to and subscribed before me this 14th day of April, 1942.

(S.) B. STUART,
Notary Public.

Filed in Evidence April 20, 1942.

STIPULATION OF EVIDENCE FOR APPEAL TRANSCRIPT

41 (Title Omitted.)

It is stipulated and agreed that the following is a complete and accurate condensation of all evidence pertinent to this appeal, adduced on the trial of defendant's motion for summary judgment, held before His Honor, Judge Dawkins, on April 20th, 1942, all of the evidence there ad-

duced being documentary. The Clerk of Court is hereby instructed to insert this stipulation into the transcript for appeal, in lieu of said evidence, to-wit:

EVIDENCE OF DEFENDANT.

DEFENDANT EXHIBIT 1.

Affidavit of D. W. Harris, Vice-President and General Manager of defendant corporation, dated March 24th, 1942:

In the years 1927 to 1930, inclusive, defendant's predecessor corporation built a natural gas pipe line into the Richland gas field, and bought gas at the price of 4½¢ per MCF (Thousand cubic feet), delivered at said pipe line in said field. Affiant personally represented the buyer and at the time of purchase was of the opinion that gas could be freely secured in the Richland field at the wellside price of 3¢ per MCF. He was so informed by Mr. Fred Legge, President of the Magnolia Gas Co., and Charles Laskey, a lease owner in the Monroe and Richland gas fields. These statements were borne out by the fact that the companies of which affiant was General Manager had actually bought some gas in the Richland field at the well for 3¢ per MCF and associates of affiant who were familiar with the field likewise informed affiant that gas could be secured at the well in the field at that price.

The reason why affiant paid 4½¢ per MCF was that, in his opinion, the unusual obligations imposed on the sellers in the pipe line contracts were worth more than the difference between the said price of 4½¢ and the base price of 3¢ per MCF for gas at the well. This opinion was borne out by experience:

Under the ordinary wellside gas purchase contract, the seller is obligated only to deliver what gas his well or

wells will produce; that is, the seller has the gas, he sells it to the buyer as it comes from the well, it is metered at the well, and the seller has no further responsibility in the matter. In these pipe line contracts, however, the reverse is true, the buyer having only a single obligation, which was to take such gas as it might need and pay for it, whereas the sellers were obligated to install gathering lines, transport the gas from the well to the pipe line, be ready at all times to deliver to the buyer such quantities of gas as the buyer might need, the buyer being given the option to fix quantities with certain minimum and maximum restrictions which might be increased at the option of the buyer from time to time. An important feature of these contracts was the obligation of the sellers to supply gas from the Monroe field in the event the Richland field became exhausted. Under the contracts, the buyer obtained without any expense to itself other than that involved in paying for the gas, an adequate reserve of gas for its future needs. Without that reserve, the buyer would have been compelled to either purchase sufficient proven leases and drill a sufficient number of wells on these leases and maintain those leases in effect or to secure contracts from the owner of a sufficient number of wells already drilled to justify the building of a pipe line.

In making this purchase of gas, affiant had in mind definitely a basic wellside price of 3¢ per MCF, and preferred to buy gas for his pipe line at a higher price, rather than buy it at 3¢ without the above assurance given by the contracts under which he bought.

The buyer and seller in this sale were not financially interested in each other, and the contracts were made at arm's length through negotiations which extended over a period of months.

During the period beginning with the year 1927 and ending March 19th, 1930, it is affiant's opinion that there was a well established price for gas at the wellside both in the Richland Field and the Monroe Field of 3¢ per MCF at two pounds above atmospheric pressure.

(It is admitted in the record, by both parties, that affiant D. W. Harris is an expert in the gas business.)

(Plaintiff objected to the admission of the foregoing affidavit on the grounds that it contained hearsay, and that the affidavit attempts to give oral testimony regarding contents of written contracts, when the contracts themselves are the best evidence.)

(The Court sustained the objection to hearsay and otherwise overruled the objection.)

43 DEFENDANT EXHIBIT 2.

Affidavit of S. D. Hunter, dated March 17th, 1942:

I have been in the oil and gas business since 1916. I began operations in the Richland gas field in the latter part of 1926. I acquired leases and drilled wells under a considerable acreage, in both the Monroe and Richland fields, until we disposed of our major properties in both fields about 12 years ago, although I still have an interest in some producing wells in the Monroe field. As President and principal stockholder in the Ouachita Natural Gas Company, I made a sales contract with the Magnolia Gas Company dated March 30th, 1928, for the sale of gas in the Richland field at 3¢ per MCF, and was delivering a large amount of gas thereunder when we sold our properties. I have since operated several smaller properties in the Richland field. We were disappointed in the price received for gas under the Century Carbon Company contract, as we had anticipated that the price of carbon black would go up, but I believe we got what the gas was worth at the well in the three cent contracts with United Gas Public Service Company, which was the prevailing market price or value of the gas at the well in that field.

(The witness then made affidavit regarding several sales of gas made by him in the year 1931 and thereafter, which, on objection by plaintiff, was ruled out by the District Court, the Court ruling that only sales during the period involved in this suit, namely, 1927 to March 20th, 1930, or within six months before or after said period, would be admitted in evidence. The counsel for plaintiff objected to the admission in evidence of the opinion expressed by affiant in his affidavit on the ground that he was not shown to be an expert in the matter of market price in the Richland gas field from 1927 to 1930, which objection was overruled by the Court saying: "I personally think that Mr. Hunter is one of the best informed men in the field, and I think his trading qualities are such that if he could get more he would get it.")

44 DEFENDANT EXHIBIT 3.

Contract of sale, dated March 31, 1928, between Ouachita Natural Gas Company, Inc., and others, as seller, and Magnolia Gas Co., as buyer, stipulating sale of a maximum of 16 billion cubic feet, and a minimum of 6 million cubic feet, annually, of natural gas delivered at measuring stations in the Monroe and Richland gas fields, at a price of 4¢ in the Monroe field, and 3¢ in the Richland field, per MCF, at 8 ounce pressure, provided said quantities can be produced by seller from its stipulated leases, seller being obligated to furnish only such gas, to above quantities, as can be procured with reasonable diligence from its specified leases.

DEFENDANT EXHIBIT 4.

Affidavit of R. H. Hargrove, dated March 31st, 1942:

Affiant is Vice-President of United Gas Pipe Line Company, and has been engaged in the gas business as an

executive officer of that company and its predecessors since 1928. Said companies have owned leases and produced gas in the Richland gas field, and affiant is particularly familiar with the various so-called pipe line contracts which were entered into by producers of gas in the Monroe and Richland fields as sellers and Arkansas-Louisiana Pipeline Company, Dixie Gulf Gas Company, Mississippi River Fuel Company, Southern Natural Gas Corporation and Memphis Natural Gas Company, as buyers; and is fully informed as to the market at the well which was maintained by affiant's companies for gas produced from the Richland gas field during the years 1928, 1929 and 1930.

On the basis of this knowledge and information, in affiant's opinion, the market price of gas at the well in the Richland field during the period from 1927 to March 19th, 1930, was 3¢ per MCF. This conclusion is based upon the following established facts:

(1) Various sales of gas in the Richland gas field by independent well owners at 3¢ or less, among them being T. L. James, Ruston Drilling Company, Richland Operating Company, Franklin Oil & Gas Company, W. C. Feazel, Sam D. Hunter, and Pelican Gas Company. These were experienced operators, and would not have sold their gas for less than what it was worth.

(2) The great majority of leases in the Richland field stipulate that the lessor's royalty interest shall be paid at the rate of 3¢ per MCF, and of the leases stipulating royalty at market price, probably 90% were paid on the basis of 3¢ per MCF, including a lease to the State of Louisiana. In almost every case where a settlement of royalty was made on basis of 4¢, such settlement was a compromise of dispute as to whether a lease had been properly developed, whether the lessor was entitled to a royalty on gasoline recovered from the gas, and whether the lessee should

pay the whole severance tax or the lessor should pay his proportion of it. The State of Louisiana was among the lessors who received and accepted as correct royalty settlements for gas produced on the basis of 3¢ per MCF.

(3) A substantial portion of the gas produced in Richland field was sold to carbon black plants and in almost every case, the net return to the seller was less than 3¢, sometimes very much less.

(4) The Monroe gas field was brought in long before the Richland field, and is of much larger extent and importance, and in that field, there was established and generally recognized a price of 3¢ per MCF for gas at the well. Much of the gas from the Monroe and Richland fields moved to a common market, and the ability of operators in the Richland field to supplement their gas supply from the Monroe field was one of the principal features in obtaining a satisfactory price for the Richland gas.

(5) Companies with which affiant was connected produced more than half of the gas which was marketed in the Richland field, and sold that gas to the best possible advantage. The weighted average price of their sales during the period beginning in the year 1928 (no sales having been made by such companies prior to 1928), and ending March 31, 1930, was 3.495¢ per MCF and when there is deducted from this weighted average price a reasonable allowance for the various services which the seller was required to render and obligations which it was compelled to assume in order to make a market for the gas, the net price actually received for the gas at the well by affiant's company did not exceed 3¢ per MCF.

(6) While prices higher than 3¢ per MCF were in most cases agreed to be paid under the so-called pipe line contracts which have been introduced in this case, the ob-

ligations of the sellers under these contracts was so onerous that after deducting from the gross price stipulated in the contracts a reasonable allowance for gathering and delivering the gas, acquiring and maintaining large reserves which would be done only by obtaining and keeping in effect leases on several hundred thousand acres of potential and proven gas producing lands, continuously drilling wells for the augmentation of the supply of gas immediately available, and installing and maintaining at all times sufficient machinery and equipment for the removal of the gasoline content from such varying quantities of gas as might be required from time to time by the buyers, the net price realized by the sellers at the well for the gas which was delivered was not in excess of 3¢ per MCF.

Ordinarily the owner of a gas well who sells his gas at the wellhead has no obligation except to deliver the gas he has into a connection provided by the buyer for as long a time as the gas supply holds out. These pipe line contracts were something altogether different; in fact, they were unique in affiant's experience in respect to the obligations imposed on the sellers. As illustrations of the burdensome and expensive character of these obligations three of the sellers to the Mississippi River Fuel Co. felt obligated to acquire and hold leases on 227,339 acres of land, in order to be sure of supplying approximately 40% of the total amount of gas agreed to be sold to that buyer. To acquire that much acreage cost the sellers a great deal of money, and the expenses did not stop with the acquisition. Wells had to be drilled or rentals paid to keep these leases alive, and it frequently happened that the primary term of the lease expired and it was necessary to obtain new leases from the same owners, which is quite an expensive undertaking.

Under the contract between the Palmer Corp. & Industrial Gas Co., as sellers, and Arkansas-Louisiana Pipe Line Co., as buyers, for its Shreveport line, the amounts of gas

taken by the buyer each day varied from 2,211,000 cubic feet to 20,835,000 cubic feet, and on its El Dorado line, varied from a low of 5,755,000 cubic feet to a high of 50,755,000 cubic feet daily. These variations mean that the seller had to maintain facilities for supplying the maximum amount at any time demanded by the buyer, yet might be able to deliver only the minimum.

A striking illustration of the real value of the sellers' obligations under these pipe line contracts is supplied by considering the case of the Arkansas Louisiana Gas Co., which built a pipe line into the Richland field and preferred to buy gas under these pipe line contracts at the prices therein stipulated rather than pay 3¢ per MCF for it at the well from the various producers who at that time were willing to sell on that basis. The wellside price of 3¢ in the Richland field was in line with the wellside price in the Monroe field at that time.

Affiant further says that it is his considered judgment that during the period beginning with the year 1927 and ending March 19, 1930, there was a market for gas at the well in the Richland field, and the market price for that gas at the well was 3¢ per MCF.

(Plaintiff objected to this affidavit as follows: To such portions as refer to sales made after March 20th, 1930, which are the sales by Franklin Oil & Gas Co., W. C. Feazel, S. D. Hunter and Pelican Gas Co.)

(Plaintiff objects to that portion of his affidavit regarding leases, on the ground that the lease is a contract for the sale of the right to go on land and drill for oil or gas and is not a sale of oil or gas, and at the time the contract is made, neither party owns or knows that they will ever own any gas, and in a great majority of cases neither party ever later owns any gas; hence this contract is irrelevant and immaterial to the price of gas many years later.)

(Plaintiff objects for the further reason that land-owners in leasing their property have two options: one, to stipulate a royalty at a fixed price, whereby they eliminate any uncertainty as to the amount of the royalty they shall be paid in the event there is a decrease in the price of gas; the second option of land-owners being that they can stipulate to receive royalty at market price, taking the risk of the market price being lower than 3¢ in consideration of the advantage of receiving more if the price exceeds 3¢. Hence the fact that certain land-owners elected the certainty of 3¢ rather than the uncertainty of market price for their royalty, is immaterial and irrelevant and the evidence is grossly unfair to plaintiff, who elected to receive market price.)

(Plaintiff further objects to the affidavit because it attempts to give oral testimony regarding the contents of written documents, namely, leases and contracts to sell, the written documents being the best evidence and readily accessible.)

(Plaintiff objects to evidence regarding Monroe gas field as irrelevant and immaterial, the Court having limited evidence in this suit to the Richland field.)

(Plaintiff objects to affidavit regarding "weighted average price of sales" because the affidavit does not state what is meant by this term, and a price quoted by this highly prejudiced witness is not admissible in evidence.)

(Plaintiff objected to reduction from pipe line prices of allowances for various services, because it is the essence of the lease sued on in this suit that lessee will pay all expenses of producing and marketing the gas, and the 1/8th royalty is stipulated in the lease to be computed on the sales price of the gas, with no deduction for expenses.)

(Plaintiff objects to that portion of the affidavit regarding deductions from the price at which gas is sold, because of alleged onerous conditions in the sales, as irrelevant and immaterial, because there is no showing that these are not the customary and usual stipulations in sales in the Richland field.)

(Plaintiff objects to testimony in this affidavit regarding ordinary sales of gas at the wellhead because there is no showing that any such sales existed in the Richland gas field.)

On these objections the District Court ruled as follows:

"The evidence represented by or reported by the affidavit will be restricted to the period of six months before and six months after the period covered in this lawsuit. With respect to leases, the Court of Appeals has held that these leases, together with all other evidence throwing light on the question of market price, are admissible, and in the judgment of this Court, any lease of this nature made in this field during this period would be substantial evidence of the value of the gas at the well. This affidavit, for the first time, according to the best recollection of the Court, brings into consideration the element affecting the admissibility of evidence as to the price of gas in the Monroe field, which did not appear in the other cases.

"What has just been said has reference to paragraph No. 4 of the affidavit wherein it recites:

" 'The Monroe field, which was always of much larger extent and importance than the Richland field and which is still an extremely important source of gas production whereas the Richland Field has been substantially abandoned, was brought in long before the Richland Field; and there was established and generally recognized in the

Monroe Field the price of three cents per MCF for gas at the well. *Much of the gas from the two fields moved to a common market; in fact, the ability of the operators in the Richland field to supplement production by adding to it gas from the Monroe field was one of the principal features enabling a satisfactory price to be obtained for the Richland gas and of thus permitting the same wellhead price to be established in the Richland Field as in the Monroe Field.*' (Italics made by this Court.)

"I do not recall heretofore in the trial of any of these cases that this point to the effect that the price in the Richland field was affected in this manner by the price in the Monroe field, ever came before me. The affidavit on this score, therefore, will be permitted to stand as it appears for such effect as this Court, and the Appellate Court may give it. I think otherwise the objections were covered by my previous rulings heretofore made, and will be overruled."

(On motion, the Court Ordered this objection and ruling to be made general to all similar testimony.)

50 DEFENDANT EXHIBIT 5.

Testimony of R. H. Hargrove, dated April 10th, 1942:

The price actually paid for gas delivered under the contracts dated May 10th, 1929, by United Carbon Company and Industrial Gas Company, as sellers, and Dixie Gulf Gas Company as buyer, was 3¢ per MCF up to November 30th, 1929, and 4¢ per MCF thereafter.

The capital stock of Mississippi River Fuel Company was owned either by the various producers of gas which sold to that company under the pipe line contracts, or by companies which owned and controlled said producers.

No delivery of gas was made under this contract until January 1st, 1930.

The contract between the Industrial Gas Company and the Southern Gas & Fuel Company of date January 14th, 1928, was a contract between corporations owned by the same people and in September, 1928, which was prior to the time that any deliveries from the Richland field were made under this contract, the contract price was reduced to 3½¢ per MCF, and this price continued in effect until December 31, 1934.

No gas was delivered from the Richland field under the contract dated May 24th, 1928, between the Industrial Gas Company as seller and Memphis Natural Gas Company as buyer. All gas was delivered from the Monroe field.

DEFENDANT EXHIBIT 6.

Affidavit of E. N. Florsheim, dated March 24th, 1942:

I am now and have been since 1916 engaged in the natural gas business. I have had considerable experience in both the Monroe and Richland fields. I have operated gas properties in both and have purchased and sold gas in both fields, which are about five miles apart. The Monroe field has been in operation for ten years before the Richland field was discovered. The Monroe field at that time had a well recognized and established price of 3¢ per MCF for gas at the well, and this was considered the price in the newer Richland field when it started. In my opinion, and the opinion of all operators in the Richland field, the market price or value of gas at the well in the Richland field was never in excess of 3¢.

I and my associates, doing business as Richland Operating Company, sold to Century Carbon Company, by contract dated July 27th, 1929, twenty million cubic feet of gas per day from the Richland field, at price of 3¢ for

the first six months; thereafter the price was based on the price of carbon black, which went down instead of up as anticipated, so that we received the minimum price of 1½¢ per MCF for all we thereafter delivered. From 1929 to 1936 we sold 7,932,829 MCF of gas under this contract, of which 168,209 MCF was sold in 1929, and 3,205,087 in 1930.

I and my associates, operating as Franklin Oil & Gas Company, sold to International Gas Products Company, Inc., by contract dated March 3rd, 1930, natural gas from the Richland field at price of 2½¢ per MCF at the well, the contract requiring buyer to take a minimum of two million feet per day. Under this contract, we delivered 67,043 MCF in 1930, 55,206 MCF in 1931 and 2,487 MCF in 1933, a total of 124,736 MCF.

These contracts were believed by us to be advantageous and profitable because of the large minimum pull agreed to be taken from our wells, although the price was lower than the 3¢ per MCF at which other sales were made and which was generally considered to be the prevailing price at the well in the field.

(Plaintiff objected to admission of this affidavit, because it gives the opinion of affiant, and he is not shown to be an expert on the subject for which he gives opinions, and plaintiff has had no opportunity to cross examine affiant as to his qualifications and there is no Court ruling permitting his opinion evidence; also because affiant testifies to the contents of written documents, and the documents themselves are the best evidence.)

(The District Court overruled this objection. Upon motion, the Court Ordered the foregoing objection and ruling to be made general to all similar evidence for defendant in this case.)

52 DEFENDANT EXHIBIT 7.

Affidavit of R. C. Stokes, dated March 24, 1942:

Affiant is Chief Clerk of Union Producing Co. at its Monroe, La., office, and in such capacity, has charge of its accounting department and is custodian of its accounting records and the accounting records of its various predecessor companies with relation to the production, purchase and sale of gas produced from the Richland and Monroe fields. These predecessor companies were: United Gas Public Service Co., Louisiana Gas & Fuel Co., Palmer Corporation of La., Industrial Gas Co., Moody-Seagraves Gas Co., State Line Oil & Gas Co., Richland Production Co., Ouachita Natural Gas Co., and Northern Louisiana Natural Gas Co.

The aforesaid records show that after deducting from the gross price realized by these various corporations for gas produced from the Richland gas field during the period 1928-1930 inclusive, the actual average unit cost of gathering and delivering the aforesaid gas, the net realization of those corporations from the sale of gas during the aforesaid period did not exceed 3¢ per MCF.

(Plaintiff objected to the admission of this affidavit, on the grounds that it was oral testimony regarding contents of written records, and the records themselves were the best evidence, and plaintiff is entitled to examine the records and cross examine the witness from the records themselves, and the further reason that the evidence regarding "Actual average unit cost" is irrelevant and immaterial, because the Supreme Court of Louisiana has decided that under leases such as here sued on, the market price intended by the parties was the price in the field where produced, and also the lease stipulates that all expenses of producing, delivering and marketing the gas shall be paid by lessee as consideration for the 7/8 of

everything produced, received by lessee; and that the royalty of 1/8th is net to the lessor without any deductions for expenses of lessee.)

(The District Court overruled this objection, and Ordered the objection and ruling made general to all similar testimony.)

53 DEFENDANT EXHIBIT 8.

Affidavit of W. C. Feazel, dated March 18, 1942:

I have engaged for the past 25 years in the oil and gas business, buying and selling leases and oil and gas lands, drilling wells and producing and selling oil and gas, in several different fields. I had been operating for a number of years in the Monroe gas field, when the Richland field was brought in in 1926. I acquired a great many leases in Richland, some of which I assigned to others, some I drilled and operated myself. There had been for some years a well recognized and established price in the Monroe field of 3¢ per MCF for gas at the well, and most of the leases I took in Richland called for royalty fixed at that price. In my opinion, the market price or value of the gas at the well in the Richland field never exceeded 3¢. I sold gas from a lease in which I was interested with Drs. Bendel & Brown, to International Gas Products, Inc., under contract dated April 18, 1930, for 2½¢ per MCF, the quantity sold being a total of 2,875,690 MCF between 1930 and 1934 inclusive, of which 837,728 MCF was sold in 1930.

I was familiar with the market for gas at the well in the Richland field maintained by the standing offer of United Gas Public Service Co. to buy gas from anyone who had it, for 3¢ per MCF at the well, on a basis of acreage production pro rata with the purchaser's other pro-

ducing properties in the field. I made the 2½¢ sale above, in preference to this offer, because it guaranteed a minimum purchase of three million cubic feet per day.

At another time I had a large quantity of gas available and could have sold it under that market of 3¢ at the well, but sold my leases and wells instead, as I considered the offer I had for them advantageous. I was never offered more than three cents for my gas delivered in the Richland field at the well, by anyone.

I also made a contract with Southern Natural Gas Corporation to sell and deliver 4% of the requirements of their pipe line, with its option to increase this to 7%, for gas from 3800 acres I had under lease in the Richland field, at 4½¢ per MCF, under a 20 year contract with the price increasing in later years. Upon an estimate made by an engineer, it would have cost me about 2¢ per MCF to gather and deliver this gas to the pipe line, and I would have been put to considerable expense in drilling additional wells, paying delay rentals and bonuses for renewals of undeveloped leases, in order to maintain the reserves committed to the contract. I would not have netted 3¢ on the contract, certainly not in the earlier years. It did not look like a profitable venture, so I sold my properties and contract.

55 DEFENDANT EXHIBIT 9.

Affidavit of C. H. McHenry, dated March 19, 1942:

I am now and have been since 1916, engaged in the gas business in the Monroe and Richland gas fields and elsewhere. I am a practicing lawyer in Monroe, La., and an executive officer of United Carbon Co., which operates gas properties in the above two fields, and others. I was connected with other companies engaged in gas production in the earlier days of the Monroe field, and own, in-

dividually, interests in gas leases and producing properties in the two fields. I have participated in negotiations for the purchase and sale of gas and am familiar with the terms of many contracts for sale of gas in both fields. The Monroe field had been in operation for ten years when the Richland field, just a few miles away, was discovered. In the Monroe field there was a well-recognized and established price for gas of 3¢ per MCF delivered at the well, and the prevailing market price at the well in the Richland field has never, in my opinion, been in excess of 3¢.

The United Carbon Co. sold and delivered gas produced in the Richland field under contract with Century Carbon Co. dated Aug. 26, 1931, specifying a minimum delivery of three million cubic feet per day, at a price fixed at 1½¢ per MCF when the market price of carbon black was 4¢ per pound or less, and an increased, graduated price for gas when the market price of carbon black was greater than 4¢, up to a maximum of 4½¢ per MCF when carbon black sold for 10¢ per pound or more. Under this contract 8,640,839 MCF of gas was sold, of which 349,097 MCF was in 1931. All of said gas was paid for at the minimum price of 1½¢ per MCF.

United Carbon Co. also sold Richland field gas under the long term pipe line contracts with the Mississippi River Fuel Co., Southern Natural Gas Corp., Dixie-Gulf Gas Co. and Arkansas-Louisiana Pipeline Co., identical, except as to quantities sold, with those of the other producer-vendors: Industrial Gas Co., Palmer Corporation of La., Hope Producing Co. and Southern Carbon Co., in which the price of the gas delivered at the receiving stations of these pipe lines was higher than 3¢, but such delivered pipe line prices are not representative of the market price or value of the gas at the well, because of the many onerous obligations imposed on and expensive operations required of the sellers over and above and in addition to the production and delivery of gas at the mouth of the well. Only after deduction of the expenses of

gathering the gas from wells where produced and delivering it at the pipe lines, a distance away; and of the large expense of maintaining the reserves of gas necessary to comply with the obligations of the vendor to deliver large quantities of gas over long terms of years and meet peak load requirements, could these pipe line prices be in any wise properly compared with the market price or value of the gas in the field.

(Plaintiff specially objected to the above evidence regarding contract with Century Carbon Co., because in that sale the price of gas was a sliding scale based on the market price of carbon black, hence the price is too vague and uncertain and dependent on factors not involved in the question of gas itself, hence has no probative value as to the market price of gas in the field.)

(The District Court overruled this objection, as going to the effect rather than the admissibility of the evidence.)

57 DEFENDANT EXHIBIT 10.

Affidavit of R. G. Taylor, dated March 18, 1942:

Affiant is Assistant Treasurer of Hope Producing Co., which operated gas producing properties in the Richland and Monroe gas fields for a number of years. The books and records of said Hope Producing Co. have been kept under affiant's general supervision for many years and affiant is entirely familiar with the prices received by Hope Producing Co. for the gas it produced in the Richland gas field and with the unit cost of getting gas from the wellhead to the point of delivery to the pipe lines in the Richland field. After deducting from the price paid to the Hope Producing Co. for the gas, the unit cost of gathering and delivering it to the pipe lines, the average

sale price of such gas up to July, 1936, was slightly less than 3¢ per MCF.

On the basis of the experience of the Hope Producing Co., the net value of gas at the well in the Richland field did not at any time prior to the year 1931 exceed 3¢ per MCF calculated at 2 lb. above atmospheric pressure, and was in fact slightly less than 3¢.

58 DEFENDANT EXHIBIT 11.

Pamphlet entitled "Natural Gas in 1928", issued by the Bureau of Mines, United States Department of Commerce, giving voluminous and detailed statistics regarding natural gas in the United States, including a table showing the estimated value at the wells of gas produced in each State. This value, for the State of Louisiana, is stated to be 3¢ per MCF in 1927 and 3.3¢ in 1928.

(Plaintiff objected to this exhibit on the ground that it was an entirely unauthenticated document; that plaintiff was given no opportunity to cross examine its author; that it showed an estimated value at the well, whereas in this case the record shows all actual sales of gas made in the Richland field, hence no estimate is admissible; that the lease sued on stipulates that plaintiffs will receive the price of gas, not its value; and that this document purports to show a price for the whole State of Louisiana while the evidence in this case is limited to the Richland field.)

(The District Court overruled this objection, for the reason that it is a government publication, and while not conclusive, has some value in the event there is no market price evidence.)

59 DEFENDANT EXHIBIT 12.

Letter from Ruston Drilling Co., Inc., to Natural Gas & Fuel Co., dated August 5, 1927, granting Natural Gas & Fuel Co. permission to take gas from two wells of Ruston Drilling Co. in the Richland gas field for six months at price of 3¢ per MCF at 8 ounce pressure, at the wells.

Also affidavit of T. J. Heard, Secretary of said buyer, to the effect that Exhibit 12 is a true and correct copy of a letter contract for the purchase of gas in the Richland gas field by the Natural Gas & Fuel Co. and that under this agreement said buyer took 277,923 MCF of gas in January and February, 1928.

DEFENDANT EXHIBIT 13.

Contract dated March 3, 1930, in which Franklin Oil & Gas Co., Inc., sells to International Gas Products, Inc., all of the gas produced from a well owned by seller in the Richland gas field, to be taken with minimum of two million feet per day, and maximum of twenty million feet per day, to be used in manufacture of carbon black, for the price at the well of 2½¢ per MCF at 10 ounce pressure.

DEFENDANT EXHIBIT 14.

Lease contract attached to plaintiff's petition and sued on in this suit:

This is an oil and gas lease, dated March 7th, 1927, between E. A. Sartor and F. B. Sartor as lessors, and Natural Gas & Fuel Corp. as lessee, in the usual form for mineral leases, leasing 500.5 acres of land in Richland Parish, Lou-

isiana, for a consideration of $17,500.00 cash. The lease stipulates a royalty on all natural gas produced as follows:

"In consideration of the premises, the said lessee covenants and agrees: * * *

To pay to the lessee $200.00 per year for each well producing gas only, until such time as the gas shall be utilized or sold off the premises, and at that time the royalty above named shall cease, and thereafter the grantor shall be paid one-eighth of the value of such gas, calculated at the rate of market price and not less than 3¢ per thousand cubic feet corrected to two pounds above atmospheric pressure, and lessor to have gas free of cost from such well for all stoves and all inside lights in the principal dwelling house on said land during the same time, by making his own connections with the wells, at his own risk and expense."

60 DEFENDANT EXHIBIT 15.

PLAINTIFF EXHIBIT 3.

Stipulation of facts agreed to be correct, filed jointly by plaintiff and defendant into the records of this suit at a previous trial, on April 18th, 1934:

It is agreed that the following written contracts were made, for sale of natural gas produced in the Richland gas field, for delivery within that field, during the period involved in this suit:

Contract No. 1:

On May 10th, 1929, the Industrial Gas Company entered into a contract for the sale of gas to the Arkansas-Louisi-

ana Pipeline Company, the essential terms, conditions and stipulations of which are as follows:

The seller declares that it is the owner of a large number of gas producing properties, including lands, leases and gas purchasing contracts in the Monroe gas field and in the Richland gas field. The contract likewise recites the ownership by the buyer of certain pipe lines, one known as the Crusader Pipe Line and the other as the La-Tex Pipe Line, which are used by it for the transportation of gas from the Monroe and Richland gas fields to the town boundaries of various towns in the States of Texas, Louisiana and Arkansas; and declares that the purpose of the buyer in entering into the contract is to increase its own supply of gas and provide a future supply of gas for the purposes of distribution and sale.

The quantity of gas to be delivered each year under the contract is specified to be not less than 5½ billion cubic feet per year and not more than 11 billion cubic feet per year; the buyer being given the option of determining the amount of gas to be delivered within these limits. The buyer is likewise given the right on six months notice to increase the minimum amount which it is required to take annually and the maximum amount which seller may be required to deliver; provided that the maximum amount shall always be twice the minimum and further provided that not more than 30 billion cubic feet may be required to be delivered by the seller in any one year.

Two places are stipulated for delivery, both in Union Parish, Louisiana, one being near the NW corner of Section 6, Township 21 North, Range 4 East, and one at a point where the 16" pipe line intersects with the West line of the NW¼ of Section 7, Township 20 North, Range 4 East, Union Parish, Louisiana.

The seller is obligated to warrant title to all gas delivered by it and to indemnify the buyer from all suits, damages and expenses arising from adverse claims, including claims of the State of Louisiana for taxes, if any.

Seller further agrees to use due diligence in drilling and operating its gas properties and keeping its gathering system and pipe lines in good repair so as to enable it to deliver such amounts of gas as buyer may require to be delivered under the contract.

The term of the contract is for ten years, beginning May 10th, 1929.

The prices at which the gas delivered is to be paid for are as follows:

(a) For 45% of the monthly deliveries from May 10th, 1929, through December 1st, 1930—3¢;

(b) For the next three years—4¢;

For the next three years—5¢;

(c) For 55% of the deliveries from May 10th, 1929, through August 31st, 1932—4¢;

From September 1st, 1932, through December 31st, 1935—5¢;

For the year 1936—6¢;

(d) For the period from January 1st, 1937, to the termination of the contract, May 9th, 1939—6¢ on all gas delivered.

Contract No. 2:

Dated May 10th, 1929, between Industrial Gas Company and Arkansas Louisiana Pipeline Company.

Quantity: Minimum of 375 million cu. ft. per year;

Maximum of 750 million cu. ft. per year;

with right on the part of the buyer to increase the maximum to 1875 million, in which event the minimum will automatically be increased to 937,500,000 cu. ft.

In event of the inability of the seller after two years to deliver the required minima quantities of gas as called for by the buyer, the buyer is given the option to cancel the contract.

Point of Delivery: Two points of delivery, one in the Monroe gas field in Section 31, Township 20 North, Range 4 East, Ouachita Parish, Louisiana; and one in the Richland gas field at a point East of Boeuff River in Section 17, Township 16, Range 6.

Price: For the first three years four months—4½¢;

For the next three years four months—5½¢;

For the remainder of the contract—6½¢.

Term of contract being ten years beginning December 1st, 1929.

Contract No. 3:

Dated May 10th, 1929, between the Palmer Corporation of Louisiana and the Arkansas Louisiana Pipeline Company.

Quantity: 50% of all gas purchased by buyer in the Monroe and Richland gas fields for transportation through its pipeline to or through the Shreveport area, with certain specified exceptions; and subject to a minimum amount of 1½ million cu. ft. per year and a maximum of 3 billion cu. ft. per year. The minimum may be increased at the option of the buyer to any amount not to exceed 7½ billion cu. ft. and the maximum will automatically increase to an amount not to exceed 15 billion cubic feet per year.

Point of Delivery: Two points of delivery, one in the Monroe gas field in Section 31, Township 20 North, Range 4 East, Ouachita Parish, Louisiana; and one in the Richland gas field at a point East of Boueff River in Section 17, Township 16, Range 6.

Price: First three years four months—4½¢;

Next three years four months—5½¢;

Remainder of the contract—6½¢.

Term of contract being ten years beginning December 1st, 1929.

Contract No. 4:

Dated May 10th, 1929, between United Carbon Company of Louisiana and Dixie Gulf Gas Company.

Quantity: Minimum of $1,620,000,000 cu. ft.;

Maximum of 3,240,000,000 cu. ft. per year.

This contract requires the seller to obtain gas for delivery from lands, leases and gas purchase contracts owned

by it and its subsidiary companies in the Parishes of Union, Morehouse, Ouachita and Richland.

Point of Delivery: Two points of delivery, one in the Monroe gas field in Section 31, Township 20 North, Range 4 East, Ouachita Parish, Louisiana; and one in the Richland gas field at a point East of Boeuff River in Section 17, Township 16, Range 6.

Price: The contract provides for the fixing of prices for gas from time to time by agreement between the parties or by arbitration in event of disagreement, with the following limitations:

Minimum of 3¢ per thousand cu. ft. until November 30th, 1929;

Next five years—4¢; and thereafter 3¢.

Maximum to be not more than 5¢ per thousand cu. ft. up to October 31st, 1932;

For the next two years up to October 30th, 1934—6¢; and

During the remainder of the contract—7.6¢.

Term of contract being ten years.

Contract No. 5:

Dated May 10th, 1929, between Industrial Gas Company and Dixie Gulf Gas Company.

Quantity: 14% of all gas which the buyer may take or use from the Monroe and Richland gas fields, subject to

a minimum of 1,890,000,000 cu. ft. per year and a maximum of 3,780,000,000 cu. ft. per year.

Point of Delivery: Two points of delivery, one in the Monroe gas field in Section 31, Township 20 North, Range 4 East, Ouachita Parish, Louisiana; and one in the Richland gas field at a point East of Boeuff River in Section 17, Township 16, Range 6.

Price: Fixing of prices by agreement between the parties or by arbitration in event of disagreement, with the following limitations:

Minimum of 3¢ per thousand cu. ft. up to November 30th, 1929;

Next five years—4¢; and

Thereafter 5¢.

Maximum not more than 5¢ per thousand cu. ft. up to October 31st, 1932;

Next two years—6¢;

Thereafter—7.6¢.

Term of contract ten years from May 10th, 1929.

Contract No. 6:

Dated May 10th, 1929, between Industrial Gas Company and Dixie Gulf Gas Company.

Quantity: 14% of all gas which the buyer may take or use from the Monroe and Richland gas fields. No minimum appears to be stipulated; but the maximum

amount which the seller may be required to deliver is declared to be 2,310,000,000 cu. ft. per year.

Point of Delivery: Two points of delivery, one in the Monroe gas field in Section 31, Township 20 North, Range 4 East, Ouachita Parish, Louisiana; and one in the Richland gas field at a point East of Boeuff River in Section 17, Township 16, Range 6.

Prices: Fixing of prices by agreement between the parties or by arbitration in event of disagreement, with the following limitations:

Minimum of 3¢ per thousand cu. ft. up to November 30th, 1929;

Thereafter—4¢.

Maximum not more than 5¢ per thousand cu. ft. up to October 31st, 1932;

Thereafter—6¢ during life of the contract.

Contract No. 13:

Sale dated March 31, 1928, by Ouachita Natural Gas Co. to Magnolia Gas Co., of minimum of 6,000,000 MCF and maximum of 16,000,000 MCF per year, delivered at pipe line gathering station. Price: 3¢ per MCF.

Contract No. 14:

Sale dated March 3, 1930, by Franklin Oil & Gas Co. to International Gas Products, Inc., of all gas produced from a well of seller, and any other wells drilled on a certain lease of 20 acres, sold at the well for price of 2½¢ per MCF.

Contract No. 15:

Sale dated April 18, 1930, by Feazel, Bender & Brown to International Gas Products, Inc., of all gas produced from well of sellers, at price of 2½¢ per MCF at well.

Contract No. 16:

Sale dated July 29, 1929, by Richland Operating Co. to Century Carbon Co. at price of gas based on price of carbon black, being graduated from 1½¢ per MCF when carbon black sells for 4¢ per pound or less, to 3¢ when carbon black sells for 7¢ per pound.

Stipulations Regarding Sales:

1.

The average price per pound of carbon black was 6¢ in 1929 and 5-1/6¢ in 1930.

2.

The average cost of transporting gas from the wells in the Richland gas field to the points of delivery referred to in the various pipe line contracts, was 3/10 of 1¢ per MCF.

4.

Contract No. 3 covers 50% of the gas purchased by the Arkansas-Louisiana Pipeline Co. for transportation thru its pipe line to or thru the Shreveport area, and the remaining 50% of said gas purchased by said buyer was purchased from Southern Carbon Co., Interstate Natural Gas Co., Hope Producing Co., United Carbon Co., and Indus-

trial Gas Co., under contracts identical with Contract No. 3.

5.

Contract No. 4 covers 12% of the gas purchased by the Dixie-Gulf Gas Co. and the remaining 88% of said gas purchased by said buyer was purchased from Southern Carbon Co., Interstate Natural Gas Co., Hope Producing Co., United Carbon Co., Industrial Gas Co., and Moody-Seagraves Co., under contracts identical with contract No. 4.

6.

Contract No. 7 covers 10% of the gas purchased by the Mississippi River Fuel Company, and the remaining 90% of said gas purchased by said buyer was purchased from Southern Carbon Co., Interstate Natural Gas Co., Hope Producing Co., United Carbon Co., Industrial Gas Co., and Mood-Seagraves Co., under contracts identical with contract No. 7.

7.

Contract No. 8 covers 16% of the gas purchased by the Southern Natural Gas Corporation, and the remaining 84% of said gas purchased by said buyer was purchased from Southern Carbon Co., Interstate Natural Gas Co., Hope Producing Co., United Carbon Co., and Industrial Gas Co., under contracts identical with contract No. 8.

8.

Pipe lines lead from the Richland gas field as follows:

(1) To St. Louis, Missouri, pipe line owned by Mississippi River Fuel Co.;

(2) To Memphis, Tenn., owned by Memphis Natural Gas Co.;

(3) To Atlanta, Ga., owned by Southern Natural Gas Corporation;

(4) To New Orleans, La., owned by Interstate Natural Gas Co.; to Baton Rouge, La., and by Southern Gas & Fuel Co., from Baton Rouge, La., to New Orleans.

(5) To Shreveport and Texas, one pipe line owned by Arkansas-Louisiana Pipeline Co., and one owned by United Gas Public Service Co., formerly Magnolia Gas Co.

(6) To El Dorado, Ark., owned by Crusader Oil Co. and leased and operated by Arkansas-Louisiana Pipeline Co.

14.

Approximately 7% to 8% of the gas produced in the Richland gas field since the middle of 1929 has been used for the manufacture of carbon black, and the remainder of the gas has been marketed through the pipe lines named hereinabove, except for a negligible quantity used locally in the field.

16.

All of the contracts herein mentioned, in which a price of less than 3¢ per MCF is stipulated, are contracts for gas to be used in the manufacture of carbon black.

18.

It is further stipulated that during the entire term that gas was produced and sold from the property leased by

E. A. and F. B. Sartor to the Natural Gas & Fuel Corporation, this being the lease under which the plaintiffs claim in this suit, the defendant made monthly reports to its lessors E. A. Sartor and F. B. Sartor as to the amount of gas utilized by defendant off the leased premises and paid its lessors for one-eighth of said gas calculated at the price of three cents per thousand cubic feet corrected to two pounds above atmospheric pressure, which monthly statements and settlements were received and accepted by E. A. and F. B. Sartor without protest and amounted to $21,999.75 through the calendar year 1932. A specimen monthly report made by defendant to its lessors is hereto annexed and made part hereof.

24.

All of the gas produced in the Richland gas field is produced under and by right of leases approximately similar in form to the lease sued on and attached to this suit, except that about two-thirds of the leases stipulate for royalty of 3¢ per MCF in lieu of the royalty of market price specified in the lease sued on in this suit.

25.

Approximately 90% of the payments made by lessees to lessors under the leases stipulating market price in the Richland field have been on the basis of 3¢ per MCF calculated at two pounds above atmospheric pressure, the remaining 10% being at 4¢ per MCF.

27.

The total amount of gas produced in the Richland gas field in the years stated was as follows:

In 1927— 1,507,814 MCF.

In 1928—11,122,997 MCF.

In 1929—42,505,978 MCF.

In 1930—84,480,918 MCF.

68 PLAINTIFFS' EXHIBITS.

In Opposition to Motion for Summary Judgment.

PLAINTIFF EXHIBIT 1.

Answer of plaintiff to motion for summary judgment, with annexed affidavit. (Previously copied into this transcript.)

(Defendant objected to this offering on the ground that it is an affidavit of plaintiffs' counsel, based upon information gained from various lawsuit trials, hence is hearsay, and affiant is not qualified to express an opinion as to the market price of gas in the Richland field, nor to translate into terms of market price at the wells the prices stipulated in the pipeline contracts.)

(The District Court overruled this objection, because it went to the effect, not the admissibility.)

PLAINTIFF EXHIBIT 2.

Affidavit of G. P. Bullis, dated April 14, 1942:

Affiant was employed by several land-owners in the Richland gas field, in Richland Parish, La., early in the year 1931, and continuously from that date to the present time has been engaged in litigation regarding the market

price of natural gas in that field. Affiant has made a thoro study of the physical features of said field, including the pipe lines serving it, the means of marketing the gas, the location of wells pipe lines, receiving stations, gasoline extraction plants, carbon black plants, etc. Affiant has personally read and examined all of the contracts of sale of gas in said field, from the year 1927 to 1935 inclusive, and has examined or cross examined almost all the producers, and all of the leading producers in said field. Affiant has personally conducted in the various Courts, ten trials in the Trial Courts or lawsuits in which the main issue was what was the market price of natural gas in said field, and has conducted appeals from all but one of said trials, to the Appellate Courts of the United States and the State of Louisiana. Affiant has therefore thoroly familiarized himself with the market price of natural gas in the Richland field.

The clients of affiant, the landowners of the Richland field, have never had any knowledge of the market price of gas in that field sufficient for evidence in Court, consequently affiant has been compelled to prove his cases in Court by extracting information from the various defendants in said cases and their officers and agents. It is therefore impossible for plaintiffs in this case to produce affidavits of persons expert in the price of natural gas, on this motion for summary judgment, because all of said experts are hostile to plaintiffs. Affiant is therefore compelled to make this affidavit personally.

This case has been twice tried in this Court before a jury of 12 men. On the first trial, the jury brought in a verdict reading as follows:

"We the jury find for plaintiffs, fixing the market price of gas at 4½¢ from 1927 to 1932 inclusive. Said price to be paid at point of delivery."

The judgment on this verdict was reversed by the Court of Appeals, and a second trial had, in which the jury was

instructed to bring in a verdict only for the period from March 20, 1930, to March 20, 1933, only. For this period, the jury fixed the market price at 4.45¢ per MCF.

On each of these trials, defendant introduced in evidence before the jury, substantially the same claims as are made in the present motion for summary judgment, and in each trial the jury unanimously rejected all of these claims.

The only sales of natural gas produced in the Richland gas field, for delivery to the buyer within the field, during the period from the year 1927 to March 20, 1930, as far as is shown by the evidence in all the cases tried, including the two trials of the case at bar, are as follows:

Sale by Ouachita Natural Gas Co., et al. to Magnolia Gas Co., dated March 31, 1928, for 3¢ per MCF at 8 oz. pressure;

Sale by Palmer Corporation, et als. to Dixie-Gulf Gas Co., dated May 10, 1929, at 3¢ and 4¢ per MCF at 10 oz. pressure;

Sale by Palmer Corporation to Ford, Bacon & Davis, dated Feb. 2, 1926, deliveries in 1927 to 1930, at 4.25¢ per MCF, at 10 oz. pressure;

Sale by Palmer Corp., et als. to Mississippi River Fuel Corp., dated Jan. 15, 1929, for 4½¢ per MCF at 8 oz. pressure;

Sale by Palmer Corp., et als. to Arkansas Natural Gas Co., dated May 10, 1929, at 4½¢ per MCF at 8 oz. pressure;

Sale by Industrial Gas Co. and others to Memphis Natural Gas Co., dated May 24, 1928, at 5¢ per MCF at 8 oz. pressure;

Sale by Ruston Drilling Co. to Natural Gas & Fuel Co., dated Aug. 5, 1927, for small quantity of drilling gas at 3¢ per MCF at 10 oz. pressure;

Sale by T. L. James to Richland Gas Co., dated Sept. 20, 1928, for 3½¢ and 4¢ per MCF at 10 oz. pressure;

A few small sales to employees, farm houses, schools, etc., at prices far above those above stated.

Defendant, Arkansas Natural Gas Corp., paid to plaintiffs 3¢ per MCF at 2 lb. pressure, as the market price of the gas produced from plaintiffs' land during the period from 1927 to March 20, 1930. One thousand cubic feet of gas at 2 lb. pressure contains 10% more gas, and its market price is 10% greater than one thousand cubic feet of gas at 8 oz. or 10 oz. pressure. Hence every one of the above named sales was at a price higher than paid by defendant to plaintiff as the market price under the lease sued on in this suit.

Since every sale of gas during the period involved, was at a higher price, and most of them at a vastly higher price, than defendant paid plaintiffs, it is utterly impossible, and frivolous, for defendant to claim, in its motion for summary judgment, that there is no genuine issue, and no substantial controversy, to dispute defendant's claim that the market price was 3¢ at 2 lb. pressure per MCF.

The affidavit of D. W. Harris attached to defendant's motion for summary judgment, is entirely false and untrue in its statement that the clauses in the contract by which that affiant bought gas in the Richland gas field were extraordinary and different from the ordinary contract of sale.

The affidavit of R. H. Hargrove attached to motion is made by affiant who is Vice-President of the Union Producing Co., which has been sued by these plaintiffs on the

same cause of action which has been sued on by plaintiffs in the case at bar, consequently his opinion is not fair or unprejudiced. Affiant's statements regarding the contents of the contracts for sale of gas to pipelines is false and untrue, as will be seen by reference to the contracts of sale themselves. Said affiant has testified in many cases before juries to the same effect as in his affidavit, and his testimony has been rejected by juries. Affiant's statement of sales is incorrect. The statement that the obligations assumed by the sellers in the pipe line contracts were unique and extraordinary is entirely untrue.

The affidavit of E. N. Florsheim attached to said motion recites sale of gas from Richland Operating Co. to Century Carbon Co. This was not an ordinary sale of gas, but was a contract for the erection and supplying of a carbon-black plant, and delivery of all the gas sold under this contract was outside the Richland gas field.

The affidavit of R. C. Stokes attached to said motion is contrary to the undisputed evidence in the case at bar.

The affidavit of R. G. Taylor attached to said motion has been shown to be incorrect, and the expense account grossly "padded", by evidence in other trials, and the books of Hope Producing Co. do not show the figures stated by this affiant.

The opinion expressed by various affiants in the affidavits attached to defendant's motion for summary judgment, are not fair and impartial opinions, but are the opinions of either of officials of companies being sued on this same cause of action, or of persons doing business with the gas companies and dependent on their favor for a living.

From affiant's long experience and study of the market price of natural gas in the Richland gas field, affiant is of the opinion that said market price was, during the year 1927, more than 3¢ per MCF at 2 lb. pressure, and during the years 1928, 1929 and 1930 was more than 5¢ per MCF at 2 lb. pressure, this opinion being based on the sales made

for delivery within the Richland gas field during said period.

The foregoing stipulation of evidence for appeal transcript in the appeal now pending in this suit, is hereby accepted as a complete and accurate condensation of the said evidence.

Dated and signed by attorneys for plaintiff and defendant, September, 1942.

G. P. BULLIS,
Attorney for Plaintiff.

....,
Attorneys for Defendant.

Filed November 20, 1942, Philip H. Mecom, Clerk, U. S. Dist. Court, West. Dist. of Louisiana.

In the United States District Court for the Western District of Louisiana, Monroe Division.

James M. Sartor, et al.,
vs. Civil Action No. 2387.
Arkansas Natural Gas Corporation.

For Plaintiffs,
Mr. G. P. Bullis,
Ferriday, Louisiana.

For Defendant,
Mr. Elias Goldstein,
(Blanchard, Goldstein, Walker and O'Quin),
Shreveport, Louisiana.

DAWKINS, J.:

The nature of this case has been fully disclosed in former decisions by the Court of Appeals for this Circuit.

Arkansas Natural Gas Corporation v. Sartor, 78 F. (2nd) 924 and 98 F. (2nd) 527.

The matter is now to be considered upon a motion for summary judgment by the defendant as to that part of the claim covering the period dating back more than three years beyond the filing of the suit on March 20, 1933.

The evidence offered on both sides is substantially the same as that in the case of Hemler v. Union Producing Company, 40 F. S. 824, except that it supports more strongly the conclusion that the market price of natural gas at the well in the Richland field did not exceed three cents per thousand cubic feet over the earlier period covered by this suit. It is for the years 1927 to March 20, 1930, which was before all the facilities in the field for marketing the gas had been developed, as was done in later years. Therefore, more of the gas was sold at the well and to other industries during the time now involved than from that date to the end of the life of the field some seven years later. Even the prices stipulated in the pipeline contracts for the years 1927 to 1930 were lower than for subsequent years.

The defendant, plaintiff in the motion for summary judgment, has offered affidavits by experts and other persons who dealt in and handled the gas in the Richland field, as well as in the Monroe field and elsewhere, to the effect that there was a well recognized price at the well in both fields and at no time did it exceed three cents per thousand cubic feet. It has also introduced many leases, contracts and other evidence showing the sale of gas at three cents per thousand cubic feet or less at the well and has established that ninety per cent of the production was paid for at that price.

Nothing was offered by the plaintiffs to dispute this proof except the affidavit of their counsel, which patently deals with the pipeline prices. Evidence as to pipeline prices, as has been held by both this Court and the Court of Appeals, was admissible only if there was no market at

the well, and it appearing from the showing made here without contradiction that there was such a price at the well, the necessity for considering the pipeline contracts or prices and the elements affecting them does not arise in this case. All of the reasons for the summary judgment in the case of Hemler v. Union Producing Company, supra, are applicable to the present case, and are adopted without repitition.

There should be judgment for defendant sustaining the motion for summary judgment, and rejecting plaintiffs' demand.

Proper decree should be presented.

Thus Done and Signed in Chambers on this the 29th day of April, 1942.

(S.) BEN C. DAWKINS,
(Ben C. Dawkins)
U. S. District Judge.

Filed April 30, 1942.

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75 MOTION FOR NEW TRIAL.

(Title Omitted.)

Now into Court come J. M. Sartor, et als, plaintiffs in the above entitled and numbered suit, and respectfully suggest that the opinion and decree herein entered on April 30, 1942, is erroneous, and contrary to the law and the evidence, and that a rehearing or new trial should be granted thereon, for the following reasons, to-wit:

1.

The Court is in error in accepting as conclusive of the market price of gas, the opinion of defendant's Vice-Presi-

dent and the officials of other companies defending themselves against this same claim; the law being that the only admissible evidence to prove the price of gas, is actual sales; and even if opinions were admissible, such opinions should be by unprejudiced witnesses and by witnesses whose qualifications have been first established by cross examination of plaintiff.

2.

The Court is in error in depriving plaintiffs of trial by jury as to the weight to be given the opinions of witnesses.

3.

The Court is in error in holding that defendant introduced in evidence many leases, contracts and other evidence showing the sale of gas at 3 per MCF or less at the well, and has established that 90% of the production was paid for at that price.

4.

The Court is in error in holding that there is a showing made here within contradiction that there was such a price at the well as 3¢ or any other price.

5.

The Court is in error in holding that there was one market price at the well (without stipulating what well is meant), and another market price in the Richland gas field, because it is inherently impossible for there to be two different market prices for gas within the Richland gas field.

6.

The Court is in error in ignoring the pipe line prices, by which 93% of the gas produced in the field was sold, in fixing the market price of gas.

7.

The Court is in error in holding that there is no genuine issue as to any material fact shown in this case.

8.

The Court is in error in failing to note and give effect to the claims made by plaintiffs in their answer to motion for summary judgment and affidavit annexed to motion.

9.

The Court is in error in denying to plaintiffs their constitutional right to trial by jury in this case.

Wherefore plaintiffs pray that a rehearing or new trial be granted herein, and that finally the motion of defendant for summary judgment be denied and overruled; pray for all necessary orders and for general and equitable relief.

(S.) G. P. BULLIS,
Attorney for Plaintiffs.

I hereby certify that copy of the above motion has been served on Blanchard, Goldstein, Walker & O'Quinn, attorneys for defendant, by mailing to them at Shreveport, La., this May 5th, 1942.

(S.) G. P. BULLIS,
Attorney for Plaintiffs.

Filed May 6, 1942.

(Title Omitted.)

For Plaintiff,
Mr. G. P. Bullis,
Ferriday, Louisiana.
For Defendant,
Messrs. H. C. Walker, Jr.,
Elias Goldstein,
Shreveport, Louisiana.

DAWKINS, J.:

After due consideration of the motion for a new trial in the above numbered and entitled cause, I am of the view that the same should be and it is accordingly overruled.

Thus Done and Signed in Chambers on this the 13th day of June, 1942.

(S.) BEN C. DAWKINS,
(Ben C. Dawkins)
U. S. District Judge.

Filed June 13, 1942.

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78 JUDGMENT.

United States District Court, Western District of Louisiana, Monroe Division.

James M. Sartor, et al,
vs. Civil Action No. 2387.
Arkansas Natural Gas Corporation.

Hearing having been had in this case upon the defendant's motion for a summary judgment upon such issues as have been left in the case by the prior decisions of this

Court and of the United States Court of Appeals for the Fifth Circuit, the Court being of the opinion that under the evidence submitted there is no substantial issue of fact and that an adequate showing without contradiction has been made by the defendant of the existence of a market at the well for the gas produced from the Richland Parish Field during the period beginning with the year 1927 and ending March 20th, 1930, which did not exceed three cents (3¢) per thousand cubic feet.

The Court Does Hereby Find As Facts (and that there is no substantial evidence to the contrary), that there was a market at the well for gas produced from the Richland Parish Field during the period beginning with the year 1927 and ending March 20th, 1930, and that the market price of gas at the well in the Richland Parish Field during the period stated did not exceed three cents (3¢) per thousand cubic feet; and Accordingly,

It is Ordered, Adjudged and Decreed that for these reasons and for the reasons stated in the opinion of the Court heretofore filed, the defendant's motion for a summary judgment be and it is hereby sustained, and that the demands of the plaintiffs for additional royalties on gas produced from wells located on lands described in the plaintiffs' petition during the period beginning with the year 1927 and terminating March 20th, 1930, be and they are hereby rejected at their cost.

Thus Done, Read and Signed in open Court on this the 19th day of June, 1942.

(S.) BEN C. DAWKINS,
United States Judge for the
Western District of Louisiana.

Filed June 19, 1942.

80 NOTICE OF APPEAL.

United States District Court for the Western District of Louisiana.

J. M. Sartor, et als,
vs. No. 2387 At Law.
Arkansas Natural Gas Corporation.

Notice is hereby given that J. M. Sartor, D. R. Sartor, and Mrs. Earline Sartor, individually and as natural tutrix of her minor children, Fred Sartor, Daniel R. Sartor and George M. Sartor, plaintiffs in the above entitled and numbered cause, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this action on June 19th, 1942.

G. P. BULLIS,
Attorney for Plaintiffs.

Address:
Ferriday, Louisiana.

Filed Sep. 11, 1942.

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81 APPEAL BOND.

(Title Omitted.)

Know All Men By These Presents, that we, James M. Sartor, D. R. Sarton, and Mrs. Earline Sartor, individually and as natural tutrix of her minor children, Fred Sartor, Daniel R. Sartor and George M. Sartor, plaintiffs in the above entitled and numbered suit, as principals, and National Surety Corporation of New York, as surety, are secured, held and firmly bound unto Arkansas Natural Gas Corporation, defendant in the above entitled and num-

bered suit, as aforesaid, in the full sum of two hundred and fifty dollars ($250.) for the payment of which well and truly to be made we bind ourselves firmly by these presents.

Dated at New Orleans, La., September 11th, 1942.

The condition of the foregoing bond is as follows: Said plaintiffs have appealed from a final judgment rendered by said United States District Court in the above entitled and numbered cause, dated June 19th, 1942, sustaining defendant's motion for summary judgment herein;

Now the condition of this obligation is that if said plaintiffs shall prosecute their said appeal to effect, and answer all costs, if their appeal be dismissed or said judgment be affirmed, or such costs as said Appellate Court may decree in said appeal, then the above obligation shall be null and void; otherwise to be and remain in full force and effect.

Plaintiffs in above suit, namely,
J. M. SARTOR, D. R. SARTOR
& MRS. EARLINE SARTOR,
Individually and as Tutrix,
By (S.) G. P. BULLIS,
Attorney,
Principals in this Bond.

NATIONAL SURETY CORPORATION,
By (S.) J. PARCHMAN HENRY,
(J. Parchman Henry)
Attorney-in-Fact.

Filed September 17, 1942.

82 BILL OF EXCEPTIONS.

Filed Dec. 3, 1942.

(Title Omitted.)

Be It Known And Remembered, that this cause came on regularly for trial of defendant's motion for summary judgment, on April 20th, 1942, before Honorable Ben C. Dawkins, Judge presiding, and during said trial, plaintiffs, J. M. Sartor, et als, opponents of said motion, offered in evidence the following:

"Agreed statement of facts, filed in this case by plaintiffs and defendant jointly on April 18th, 1934."

On April 18th, 1934, plaintiffs and defendant jointly filed in the record of this case in this Court, a document signed by counsel for plaintiffs and defendant, headed as follows:

"Subject to the right of either plaintiffs or defendant to object to the admissibility in evidence of the original contracts themselves on any legal grounds, the parties hereto have agreed that if the Court holds that the original contracts themselves would be admissible in evidence, the following statement of their contents shall be filed in evidence in place of the original contracts. In case any contract, or any part thereof, is held inadmissible in evidence by the Court, then reference to such contract shall be stricken out of this statement. All of the prices stated in these contracts are for gas computed at eight ounces above atmospheric pressure unless otherwise stated."

Next followed a condensation of the contents of 19 written contracts for the sale of natural gas in the Richland gas field, including the following:

"Contract No. VII."

"Dated August 1st, 1929, between Palmer Corporation of Louisiana and Mississippi River Fuel Company.

Quantity:

10% of the gas required by pipe line. Minima and Maxima not being stipulated.

Point of Delivery:

A point in the Monroe Gas Field in Section 24, Township 20, Range 4, Ouachita Parish, La., and in the Richland Gas Field a receiving station near Alto, La., in the NE corner of W½ of the SW¼, Section 11, Township 16, Range 6, Richland Parish.

Price:

For the first three years—5¢;

For the next two years—6¢.

Term of contract twenty years from August 1st, 1929."

Contract No. VIII."

"Dated Jan. 15, 1929, between Industrial Gas Company and Southern Natural Gas Corporation.

Quantity:

16% of the requirements of the buyer's pipe line, gas to be transported into Mississippi, Alabama, Tennessee and Georgia.

Minimum of 4,800,000 cu. ft. per day;

Maximum of 21,000,000 cu. ft. per day.

Point of Delivery:

In the Monroe Gas Field, within one mile of Spyker, La., and not more than five miles from the buyer's receiving station near Guthrie, La.; and in the Richland Gas Field, at a point to be selected by seller in Sections 3, 4, 9, 10, o5, 16, Township 16, Range 6 East.

Price:

For the first three years—4½¢;

For the next two years—6¢ to 6½¢."

Following the aforesaid condensation of 10 contracts of sale, filed in the record in this case as aforesaid, was a heading "Stipulations", followed by 30 numbered unconditional stipulations of facts, and among other things referring to the aforesaid condensation of contracts of sale.

After the aforesaid trial of this case; the said District Judge sustained said motion for summary judgment, and rendered and signed a judgment dismissing plaintiffs' suit on said summary judgment, and plaintiffs have appealed from said judgment, to the United States Circuit Court of Appeals for the Fifth Circuit, which appeal is now pending.

In preparing condensed statement of the evidence on the trial of said motion for summary judgment, to be used in the transcript of appeal, counsel for plaintiffs sought to include in said transcript the above quoted condensations of Contracts Nos. VII and VIII, which counsel claimed was a part of the above quoted offer of evidence introduced

on the trial of the case, which offering had been received without objection, and counsel for defendant objected, on the ground that said condensation of said contracts was not included in said evidence offered by plaintiffs on the trial.

On this controversy as to contents of record on appeal, the said District Court ruled as follows:

"A controversy has arisen between counsel as to whether there should be included in the transcript of appeal as part of the evidence offered by plaintiff, both the general stipulation between counsel filed on the first trial of this case, and the stipulated terms of certain contracts, particularly pipe line contracts. Counsel for defendant, plaintiff in the motion for summary judgment, had offered certain of the general stipulations, to-wit: Nos. 1, 2, 5, 6, 18, 24, 25, and 27, and in addition thereto and subsequently 'all the contracts, the contents of which are heretofore stipulated, by and between counsel at the prior trial of this case, the numbers and descriptions thereof being as follows', which included stipulations as to the contents of contracts numbers 1, 2, 3, 4, 5, 6, 14, 15 and 16. As arranged in the printed record of the former appeal, certified by the Clerk of this Court, on March 25, 1938, these stipulations were printed, the one following the other, and as to the contents of contracts, it was said:

"Subject to the right of either plaintiffs or defendants to object to the admissibility in evidence of the original contracts themselves on any legal grounds, the parties hereto have agreed that if the Court holds that the original contracts themselves would be admissible in evidence, the following statement of their contents shall be filed in evidence in place of the original contracts. In case any contract, or any part thereof, is held inadmissible in evidence

by the Court, then reference to such contract shall be stricken out of this statement."

After the term of these contracts L to XIX had been recited, there appeared a separating line in the printed record, and then the heading "Stipulations", beginning with L and running consecutively to 9, 14, 15, 16, 18, 20, 21, 23, 24, 25, 27, 28, 29 and 30. In other words, apparently, all the joint stipulations were not copied into that printed record. It was copies of this record that were being used by both counsel in this case at the time of the motion for summary judgment.

When it came plaintiff's time to offer evidence on the motion, their counsel offered the answer to the motion, together with the affidavit of himself attached, as well as a later one by the same affiant. The only other offering by plaintiff was agreed statement of facts filed in this case by plaintiffs and defendant jointly, on April 18, 1934."

Nothing was said about the stipulations as to contents of documents, which were, as above indicated, made separately from the general stipulations. It was the impression of the Court that counsel for plaintiffs intended, since defendant had offered some, but not all of its general stipulations, to include them all.

As shown by the written opinion of this case, the Court, as in a previous one against the Union Producing Company, in which counsel for the plaintiff was the same, ruled that, in view of the evidence showing a market price at the well, the pipe line contracts could not be considered, and had it been indicated that his purpose on the trial of this motion was to offer the stipulated contents of these contracts, counsel for defendant would undoubtedly have objected, and the Court, to be consistent, would have held them inadmissible. Besides, as the above quotation

at the beginning of the stipulation about such contracts shows, it was not an agreement that the contracts were admissible or should be considered, but that, if the Court held them so, then the recital of their terms would be used instead of copying the lengthy documents into the record.

Under the circumstances, the Court will allow counsel for plaintiff to attach to his bill of exceptions such of the stipulated terms of these contracts as he sees fits, in order that the Appellate Court may see the basis upon which this ruling is made, in connection with the transcript of the note of evidence taken at the time of the trial of the motion. However, they are not to be considered as part of the record upon which this Court acted and from which this appeal is taken.

Done and signed in chambers at Lake Charles, La., this 25th day of November, 1942.

BEN C. DAWKINS,
U. S. District Judge."

To which ruling of the District Court plaintiffs except and reserve this, their bill of exceptions, and pray that this bill of exceptions be allowed, filed, settled and signed.

G. P. BULLIS,
Attorney for Plaintiffs.

Settled and allowed this 3rd day of December, 1942, in term.

BEN C. DAWKINS,
Judge.

Filed Dec. 3, 1942.

PETITION AND ORDER EXTENDING TIME.

86 (Title Omitted.)

To the Honorable the Judges of said Court:

Now into Court comes J. M. Sartor, et als, plaintiffs and appellants herein, and respectfully show:

1.

On September 11, 1942, plaintiffs gave notice of appeal to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, from final judgment rendered by this Judgment herein.

2.

The Clerk of this Court advises that it will not be practicable to file the transcript of appeal in said Appellate Court within the forty days period after said notice allowed by law.

Wherefore plaintiffs and appellants pray that an extension of time for filing said transcript in said Appellate Court be granted for a period of ninety days from September 11, 1942; pray for all necessary orders and for general relief.

G. P. BULLIS,
Attorney for Plaintiffs.

ORDER.

The foregoing application considered, it is Ordered that plaintiffs in the above entitled and numbered cause are hereby granted an extension of time, and delay, for a period of ninety days from September 11, 1942, in which

to file in the United States Circuit Court of Appeals for the Fifth Circuit their transcript of appeal in this cause.

Signed in chambers at Shreveport, La., this 13 day of October, 1942.

BEN C. DAWKINS,
District Judge.

Filed October 13, 1942.

STIPULATION FOR APPEAL TRANSCRIPT.

87 (Title Omitted.)

To Philip H. Mecom, Clerk of Court:

You are hereby requested to prepare transcript for appeal to the United States Circuit Court of Appeals for the Fifth Circuit in the appeal now pending in the above case, and to include in said transcript, the following documents and none other, to-wit:

1. Plaintiffs' petition, filed March 20, 1933.
2. Defendant's answer, filed Nov. 5, 1933.
3. Verdict of jury, dated April 20, 1934.
4. Judgment of District Court, dated May 15, 1934.
5. Mandate of Court of Appeals, dated Oct. 7, 1935.
6. Verdict of July, dated Oct. 14, 1937,
7. Judgment of District Court, dated Dec. 30, 1937.

8. Mandate of Court of Appeals, dated Dec. 20, 1938.

9. Judgment of District Court, dated Oct. 23, 1939.

10. Mandate of Court of Appeals, dated July 10, 1940.

11. Motion for summary judgment, filed by defendant Apr. 5, 1942 (not including annexed affidavits).

12. Answer to motion, filed by plaintiff Apr. 14, 1942, including affidavit to answer.

13. Stipulation of plaintiff and defendant of evidence for appeal transcript.

14. Opinion of District Court, filed April 30, 1942.

15. Motion for new trial, filed by plaintiff May 6, 1942.

16. Judgment of District Court on motion for new trial, filed June 13, 1942.

17. Final judgment of District Court, filed June 19, 1942.

18. Notice of appeal.

19. Appeal bond.

(S.) G. P. BULLIS,
Attorney for Plaintiffs.

Filed November 20, 1942.

88 CLERK'S CERTIFICATE.

I, PHILIP H. MECOM, Clerk of the United States District Court for the Western District of Louisiana, do hereby certify that the foregoing eighty-seven (87) pages contain and form a full, true and correct copy of the record, and all proceedings had in a cause entitled J. M. Sartor, et al, vs. Arkansas Natural Gas Corporation, No. 2387 on the Law Docket of this Court, as fully as the original of same remains on file and of record in this office, at Shreveport, Louisiana, the said transcript having been prepared in accordance with Designation filed by counsel in said cause, a copy of which accompanies this transcript.

Witness my official hand and the seal of this Court, at the City of Shreveport, Louisiana, on this the 8th day of December, A. D. 1942.

(Seal)

PHILIP H. MECOM,
Clerk,
By MINA E. HOLT,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET AL.,
Petitioners,

vs.

ARKANSAS NATURAL GAS CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

G. P. Bullis,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET AL.,

Petitioners,

vs.

ARKANSAS NATURAL GAS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable, The Supreme Court of the United States:

Petitioners, James M. Sartor, Daniel R. Sartor and Mrs. Earline Sartor, individually and as executrix (plaintiffs in the lower Court), pray that writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled suit.

Jurisdiction.

Review is sought under United States Code, Title 28, Section 347 (Judicial Code, Sec. 240). The Judgment of the Court of Appeals was rendered March 29, 1943; rehear-

ing was applied for on April 16, 1943; and rehearing was denied without opinion on May 11, 1943. The opinion of the Court of Appeals is reported in 134 Fed. (2) 483.

Questions Presented.

Question No. 1. The use or mis-use of Summary Judgment, as permitted by Rule 56 of the Rules of Civil Procedure for the District Court of the United States, adopted by this Court on Dec. 20, 1937, said Rule 56 reading in its pertinent part:

> "(b) A party against whom a claim, counter claim, or cross-claim is asserted, or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) * * * The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.
>
> (e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

(1-a). May a District Court deprive a litigant of trial by jury, by granting summary judgment, when the evidence is conflicting, and summary judgment requires the determination of controverted facts and the weight, sufficiency and effect of evidence?

(1-b). May the *opinions* of witnesses testifying by affidavit be used as a basis for summary judgment, or must the testimony be on facts only?

(1-c). Is a litigant deprived of due process of law, when hostile witnesses testify to their opinions by affidavit, and the litigant is deprived by the practice in summary judgment, of the right to cross-examine these hostile witnesses as to their qualifications as experts, and the basis of their opinions.

(1-d). When two juries have decided all the facts in a case in favor of plaintiff, in previous trials, may summary judgment be rendered in favor of defendant on the same facts?

(1-e). The rule states that "pleadings, depositions and admissions on file" shall be used on trial for summary judgment. Does this include documents filed in a previous trial of the same case?

(1-f). May the affidavits of witnesses state the contents of written documents not in evidence?

Question No. 2. Did the Court of Appeal decide an important question of local law in a way in conflict with applicable local decisions, in deciding that land-owners holding leases entitling them to a royalty of one-eighth of the market price of the gas produced, are entitled to the market price at the well, to be determined by opinions of experts, when the Supreme Court of Louisiana has decided they are entitled to the market price in the field where the gas is produced, to be determined by sales in the field?

Statement of the Matter Involved.

Petitioners, who are farmers, ignorant of the gas business, own a farm situated in the Richland gas field, in Louisiana. This gas field is a small area, about eight miles square, from which large quantities of natural gas have been produced.

Petitioners leased their land to respondent, Arkansas Natural Gas Corporation, by a customary and widely used

form of lease, stipulating that respondent, as lessee, should bear all of the expense of producing and marketing natural gas from the land, and pay to petitioners, one-eighth of the MARKET PRICE of all gas produced (R. 5, 7). Under this lease, respondent produced much natural gas.

Petitioners filed this suit on March 20, 1933, asking the Court to determine the market price of gas, to which they were entitled under their lease, for the years 1927 to 1932 inclusive.

This issue was tried by jury in 1934. On this trial, a statement of facts, agreed to by both parties, was filed in evidence, showing that all of the sales of gas in the Richland gas field during those years were made by nineteen written contracts of sale. All sales, except one trivial sale of drilling gas, are sales to pipe lines which were built into the field to take the gas to distant points of consumption. This is the only way in which natural gas can be marketed, and the sales are for delivery over a period of several years. Most of these sales were made in 1928 and 1929. The prices in these sales, at the receiving points in the Richland field were 2½¢ to 7.6¢ per thousand cubic feet (R. 44, 69). The agreed statement of facts stipulated that the cost of transporting gas from the wells to the delivery point to these pipe lines in the gas field was 3/10 of 1¢ (.3¢) per thousand cubic feet (R. 77). No gas was sold at the wells involved in this suit.

On this evidence, the jury brought in a verdict reading as follows (R. 17):

> "We, the jury, find for the plaintiff, fixing the market price of gas at 4½¢ from 1927 to 1932 inclusive. Said price to be paid at the point of delivery."

On appeal, the Court of Appeals for the 5th Circuit reversed and remanded for new trial, holding that the District Court erred in admitting in evidence the written con-

tracts of sale, because they guaranteed delivery of large quantities of gas. *Arkansas Natural Gas Co.* v. *Sartor*, 78 Fed. (2) 924. How market price can be proved without proving the sales, or why large sales do not prove market price, the Court did not explain.

On second trial in 1937, this ruling of the Court of Appeals was disregarded; and the same contracts of sale were introduced in evidence as on the first trial. This was necessary because there were no other sales, and the parties and trial court knew no other way to prove market price. However the District Court ruled that petitioners' claims for gas produced prior to March 20, 1930 were barred by statute of limitations (called "prescription" in Louisiana). Under this ruling, the jury in this second trial brought in the following verdict (R. 21):

> "We, the jury, find for plaintiffs, that the average price of gas at the well in Richland Parish, Louisiana field during the period beginning March 20, 1930 and ending March 20, 1933 to be .0445 per 1000 cu. ft. at 8 oz. pressure."

This jury, when polled, explained that this price of .0445 (4.45¢) was reached by fixing the market price in the field at 4.75¢, and deducting .30¢ for agreed cost of delivery from the wells to the pipe line receiving stations, leaving the market price of 4.45¢ at the well.

A second time this case was carried to the Court of Appeals for the 5th Circuit. This time, that Court affirmed the above jury verdict. *Sartor* v. *Arkansas Natural Gas Co.* 98 Fed. (2) 527.

However, the Court of Appeals reversed the ruling of the District Judge that petitioners' claims prior to March 20, 1930 were barred by statute of limitations, and remanded the case for award to petitioners of the market price for gas produced prior to March 20, 1930, the Court indicating that this might be done without new trial, evidently mean-

ing that the market price prior to March 20, 1930 was the same as fixed by this jury after that date.

The District Judge ordered a third trial of the case, to determine the market price from 1927 to March 20, 1930, and it is this matter which is now at bar; it being now res adjudicata that the price at well was 4.45¢ on March 20, 1930 and thereafter.

Despite the fact that all possible evidence had been introduced on the two previous trials, and had resulted in two heavy verdicts in favor of petitioners; and despite the fact that it was now res adjudicata that the market price on March 20, 1930 was 4.45¢ and the sales were substantially the same before as after that date; respondent had the audacity to file a motion for summary judgment under Rule 56, as above stated.

On the trial of this motion for summary judgment, substantially the same evidence as in the two previous trials was introduced, in the form of affidavits and contracts of sale. Detailed statement of the evidence will be shown in supplementary brief. The record differed from the two jury trials in two details, as follows:

1st. The District Judge ruled that two of the nineteen contracts of sale were not in the record for summary judgment, because they were not included in specific offerings at the trial of the motion for summary judgment. Petitioners took the view that all admissions in the record from previous trials of this case were before the Court on motion for summary judgment under the express terms of Rule 56, and petitioners brought up the two contracts on bill of exceptions (R. 95). This is not of great importance under the view taken by the Court of Appeals; especially as there are many other similar contracts of sale in the record.

2nd. The vitally important difference between the record on this motion for summary judgment, and the record on

previous jury trials is, that under summary judgment practice, petitioners were not able to cross-examine respondent's witnesses.

On the two previous jury trials, respondent was confronted with the fact that all of the sales of gas showed a market price far in excess of 3¢. Respondent attempted to overcome this by having its Vice President, and the officials of other gas companies testify that in their opinion the market price did not exceed 3¢. Petitioners unsuccessfully objected to this form of evidence, but by cross-examination in open court, showed that these witnesses were unfair, interested in the outcome of this suit, and prejudiced; and that the facts on which they based their so-called opinions were largely false and untrue; thereby discrediting this testimony so clearly that each of the juries refused to give these opinions any credence whatsoever; and decisively rejected it in their verdicts.

On the trial of this motion for summary judgment, petitioners were denied the privilege of cross-examination. Hence these opinions, with all of their false statements of fact, prejudice, detailed and untrue statements of the contents of written documents not in evidence, etc., stands uncontradicted in the record. Petitioners, being farmers, were unable to obtain any gas experts to testify to expert opinions, but relied upon the facts shown in the record.

The District Court and the Court of Appeals granted summary judgment in favor of respondents, on the basis of these opinions of respondent's officials and associates.

The Court of Appeal reaffirms its ruling on the first jury trial above stated, that the contracts of sale to pipe lines are not admissible in evidence, treating this as stare decisis, and overlooking the squarely contrary jurisprudence established by the affirmance of the jury verdict on the second trial of this case, based on these contracts. *Sartor v. Arkansas Natural Gas Corporation*, 134 Fed. (2) 433, 435. All

of the nineteen contracts of sale of gas in the Richland gas field during the period here involved were pipe line sales, excepting a trivial sale of drilling gas in 1927, hence this ruling of the Court of Appeals completely eliminates all sales of gas to prove market price, leaving only the opinions of the gas company officials. On this evidence, the Court of Appeals decided as follows, (p. 436):

> "It will serve no useful purpose to enter into an analysis of the supporting proofs offered by movant. It is sufficient to say that they establish without contradiction or question of any kind that in the early years of the field involved in this suit, there was a market price for the gas at the well, and that that market price was never at any time during any of the years in question in excess of the 3¢ which defendant consistently paid."

The Court of Appeals could arrive at this holding that there is no "contradiction or question of any kind", only by eliminating from consideration, not only all the sales of gas, but also the two affidavits filed in evidence by petitioners (R. 33, 42). These two affidavits, while not pretending to be made by gas experts qualified to give opinions, did swear to facts contradicting every fact offered by respondent, and showing that respondent's witnesses were prejudiced and interested in the outcome of this suit; that many of the facts testified by them were untrue and only one of them was qualified as an expert to give opinions; and that their testimony largely pertained to the contents of written documents not in the record. Petitioners had unsuccessfully objected during the trial to the opinion affidavits of respondent on these grounds (R. 51, 52, 57, 59, 61, 62);

Since these affidavits of petitioners are unquestionably in the record, the Court of Appeals could have arrived at its verdict only by weighing these affidavits, and those offered by respondent, and deciding as between the conflicting af-

fidavits which should be accepted. This is clearly a Jury function.

Neither the District Court nor the Court of Appeals mentioned the fact that two juries, on substantially the same evidence, (except cross-examination of respondent's witnesses), had given heavy verdict for petitioners; nor the situation that it is now res adjudicata, on the verdict of the second jury, upheld by the trial judge and the Court of Appeal, that the market price is 4.45¢ on March 20, 1930, whereas the summary judgment adjudges that there is no contradiction or question, that it was less than 3¢ on the day before March 20, 1930.

Reasons for Allowance of Writ.

This Court has never in any reported case, considered the use or abuse of summary judgment, or adjudicated the practice under Rule 56, since it was adopted in 1937.

Summary judgment is a new and drastic remedy. It permits a judge to deny to any litigant, trial by jury. It bars a litigant from cross-examining hostile witnesses, and the examination of his adversary under oath, permitted by Rule 43. It permits a party to have his witnesses testify in privacy, and to put the testimony of his witnesses in perfect form, without having the witness disturbed by sitting on a witness stand before a jury and adverse attorney.

Such tremendous power is easily abused. Summary judgment will, of course, be sought by every litigant desiring to avoid trial by jury as in the case at bar. Trial by jury is the protection of the little man. Unless closely supervised and safe-guarded, summary judgment will be used in many cases all over the country to break down this protection. Summary judgment lends itself well to those who seek to "make the worse appear the better cause", especially to powerful litigants enjoying highly skilled attorneys and experts, who can prepare a trial in their offices,

without danger that a witness may say too much, or be unmasked upon cross-examination.

The case at bar seems to petitioners a clear example of mis-use of summary judgment: prejudiced witnesses testifying to opinions, with petitioners barred from cross-examination; petitioners' documentary evidence barred on technical grounds; a patent attempt by respondent to avoid jury trial; conflicting evidence and credibility of witnesses decided by the judge.

Summary judgment is a very popular and widely used practice. We respectfully submit that it would be timely, and extremely helpful to justice if writ were granted in this case, and the court draw clearly the line between use and abuse of summary judgment. Clear jurisprudence and definite interpretation of rule 56 seems now lacking.

Petitioners respectfully suggest that to avoid injustice and denial of the constitutional right of jury trial in many cases where a weak litigant is pitted against a powerful opponent, that the jurisprudence should be made clear, that summary judgment cannot be granted where there is any controverted fact; that the procedure is stricti juris; that every presumption is in favor of a jury trial; that opinion-evidence should not be permitted, but only evidence of facts; that the facts must be clear and unquestionable; that all of the documents in the record from previous trials or otherwise, are before the Court on trial of the motion without special offering; and in general, that summary judgment cannot be used as a device to trap an unwary litigant, or evade jury trial.

Second Question.

Petitioners rely, for allowance of writ, also on the second question propounded, namely, that the Court of Appeal failed to follow local law.

This is a suit on a Louisiana contract, executed in the State of Louisiana. The Supreme Court of Louisiana, in the case of *Wall* v. *United Gas Public Service Company*, 178 La. 908, 152 So. 561, had before it a lease contract having verbatim the same royalty clause as in the case at bar (this being a commonly used printed form), and in that case expressly and strongly held that the "market price" stipulated in the lease, means the market price in the gas field where the gas is produced, to be determined by the sales in the field. Petitioners' brief supplementing this petition gives full details of this Louisiana jurisprudence.

The Court of Appeals holds that "market price" in the lease means the market price at the well, and since there were no sales at the well, this market price is to be determined by the opinions of gas experts.

The decision of the Court of Appeals seems contrary to the jurisprudence established by this Court in the case of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, holding that Federal Courts must follow local law in local cases.

The decision of the Court of Appeals, making the market price of gas dependent upon the opinions of expert witnesses instead of on actual sales, put land-owners at the mercy of the expert gas companies, because land-owners cannot command the services of gas experts.

Natural gas is one of the prime assets and major products of the United States. It is produced (in the Southern states at least) mostly under leases similar to the one here at bar, providing that the land-owner shall receive one-eighth of the market price or value of the gas produced from his land. The jurisprudence, and the method by which proof is to be made of what is this market price, is therefore of the greatest importance to thousands of big and little land-owners, at least in Louisiana and Texas.

The jurisprudence of the Supreme Court of Louisiana requires that the sales of gas be put in evidence, and from them the jury determines the market price. This is a simple, clear precedure, which would avoid all the conflicts of evidence in the case at bar. Land-owners can easily prove the sales, so this jurisprudence puts the land-owners on terms of equality with the gas companies, in the production of evidence.

Prayer.

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to certify and send to this Court a full transcript of the record and all proceedings in the case entitled J. M. Sarter, et al. *v.* Arkansas Natural Gas Corporation, No. 10,517 on the docket of said Court of Appeals, and after due hearing and consideration by this Court, that the judgment of said Court of Appeals be reversed and remanded to the United States District Court for the Western District of Louisiana for trial by jury; and for such other relief as to this Court may seem proper.

G. P. BULLIS,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET AL.,

Petitioners,

vs.

ARKANSAS NATURAL GAS CORPORATION.

BRIEF SUPPORTING PETITION.

Petitioners show additional details of the two questions submitted in petition.

1. Summary Judgment.

To show how the Court of Appeals mis-applied the beneficient remedy of summary judgment, a more detailed statement of the record in the trial of the motion for summary judgment is here submitted.

Respondent or Movant's Evidence.

To support its motion for summary judgment, respondent, Arkansas Natural Gas Corporation, relied almost entirely on six affidavits of gas officials, swearing that, in their opinion, the market price of natural gas in the Richland

gas field never exceeded 3¢ per thousand cubic feet. These affidavits are:

D. W. Harris, Vice-President of respondent (R. 49);
S. D. Hunter, President of Ouachita Natural Gas Co. (R. 51);
R. H. Hargrove, Vice-President of United Gas Pipe Line Co. etc. (R. 52, 59);
E. N. Florsheim, Vice-President of Richland Operating Co. (R. 60);
W. C. Feazel, Independent gas producer (R. 63);
C. H. McHenry, Secretary of United Carbon Co. (R. 64).

To permit these officials to decide the rights of a farmer suing a gas company is like permitting a cat to decide whether a mouse should live.

Most of these witnesses swear positively that in their opinion the market price of the gas never, at any time, exceeded 3¢, which contradicts the verdict of the second jury, now res adjudicata, that the price after March 20, 1930 was 4.45¢. This shows the worthlessness of these opinions.

Each of these witnesses testified in the preceding jury trials. In open court petitioners had the privilege of cross-examination, and each of the two juries refused to accept their opinions or testimony, but based their verdicts entirely on the sales, as shown by their verdicts and poll. In so far as these affidavits attempted to state facts, not opinions, these witnesses almost entirely stated the contents of written documents not in the record, to which petitioners objected at the trial, as shown in the record at the end of each affidavit. Surely in a motion for summary judgment, the documents, not affidavits regarding them, should be produced.

The second line of evidence offered by respondents in support of their motion for summary judgment was four sales of gas:

1. Sale to Ruston Drilling Co. of a trivial quantity in 1927 at 3¢ (R. 68);

2. Sale to Magnolia Gas Co. in 1928 at 3¢ (R. 52);

3. Sale to Century Carbon Co. in 1929 at 3¢ for first six months and price based on the market for carbon-black thereafter (R. 77);

4. Sale to International Gas Products Co. March 3 or March 30, 1930 at 2½¢, but no deliveries made during the period involved in this suit.

The third line of evidence offered in support of motion for summary judgment was the affidavit of two bookkeepers employed by gas companies, that their books showed the net proceeds of their sales of gas (i. e. their profits), did not exceed 3¢ per thousand cubic feet (R. 62, 66).

The fourth line of evidence was a pamphlet of the U. S. Bureau of Mines showing that the estimated value at the wells of gas produced in Louisiana was 3¢ in 1927 and 3.3¢ in 1928 (R. 67).

This was all the evidence offered by respondent, in moving for summary judgment. We respectfully submit that the motion should have been denied on respondent's evidence.

Petitioners' Evidence

In opposition to granting motion for summary judgment, petitioners relied mainly on the actual sales.

Petitioners put before the Court a complete picture of the sales, by listing *all* the sales of natural gas made in the Richland gas field during the period of time involved in this suit (R. 42, 43), as follows:

Sale to Natural Gas & Fuel Co. in 1927 for 3¢ per thousand cubic feet;

Sale to Ford, Bacon & Davis in 1926 to 1930 for 4.25¢;

Sale to Magnolia Gas Co. in 1928 for 3¢;
Sale to Richland Gas Co. in 1928 for 3½¢ and 4¢;
Sale to Memphis Natural Gas Co. in 1928 for 5¢;
Sale to Southern Gas & Fuel Co. in 1928 for 5¢ and 6¢;
Sale to Dixie Gulf Gas Co. in 1929 for 3¢ and 4¢;
Sale to Mississippi River Fuel Co. in 1929 for 5¢;
Sale to Southern Natural Gas Co. in 1929 for 4½¢;
Sale to Arkansas Natural Gas Corp. (Respondent herein) for 4½¢.

The above sales stand unquestioned and undisputed in the record. The Court of Appeals is correct in saying that all of them (except the 1927 sale of drilling gas to Natural Gas & Fuel Co. for 3¢), were sales of large quantities of gas. There are no sales of smaller quantities of gas, because gas can be marketed only thru pipe lines, which must handle large quantities of gas to amortize their cost.

There were two other sales; one a sale stipulating price of 3¢ per thousand cubic feet for the first six months, and thereafter the price varying with the price of carbon black, made to Century Carbon Co. in 1929 (R. 77), which petitioners did not include, because it was not a cash sale at a fixed price; the other a sale to International Gas Products Co. made March 3, 1930 (R. 76), a few days before the expiration of the time involved in this suit, and under which no gas was delivered during this period.

In addition to sales, petitioners introduced in evidence two affidavits (R. 33, 42), which expressly and in detail deny almost every allegation of fact of any importance in respondent's six affidavits.

Second Question.

Conflict with Applicable Local Decisions.

The contract of lease sued on in this suit was made and executed in the State of Louisiana.

The Supreme Court of Louisiana has decided a suit substantially the same as the suit here at bar, in the case of *Wall* v. *United Gas Public Service Co.* 178 Louisiana 908, 152 Southern Reporter 561.

In that case, the Louisiana Court interpreted the royalty clause in a lease, which royalty clause read as follows:

> "The grantor shall be paid one-eighth (⅛) of the value of such gas, calculated at the market price per thousand feet, corrected to two pounds above atmospheric pressure."

By referring to the record in this suit at page 7 it will be seen that this is exactly the same royalty clause as in the lease sued on in the suit here at bar, except that in the case at bar a minimum of 3¢ is stipulated.

The issue in this Louisiana case was the same as in the case at bar. On this issue the Supreme Court of Louisiana said:

> "In the lease contract here involved, the lessee was required to pay to the lessor one-eighth of the value of the gas sold off the premises, calculated at the "market price" thereof. The price to be paid was left open, or made to depend upon the "market price" at the time the gas was produced * * * There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether the term "market price" meant the price at the well or the price the gas would bring in a market remote from the well. We think it reasonable to assume that the parties intended that, if there was a market for gas in the field, the current market price there should be paid."

The Supreme Court of Louisiana then quotes with approval the definition of market price given by this court in the case of *Muser* v. *MaGone*, 153 U. S. 240, as follows:

> "The price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such

prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold, in the ordinary course of trade."

This ruling of the Supreme Court of Louisiana was affirmed by that Court in the case of *Sartor* v. *United Carbon Co.*, 183 Louisiana 287, 163 Southern Reporter 103, and has never been changed.

The Court of Appeals cited the case decided by the Supreme Court of Louisiana, *Sartor* v. *United Gas Public Service Co.*, 186 Louisiana 555, 173 Southern Reporter 103, in which that Court rejected certain of the pipe line sales contracts offered in the case here at bar. This case is not pertinent, because the evidence regarding these pipe line contracts was not the same in that State case as the case at bar. A ruling that a certain document is not admissible in evidence, in one case, is not stare decisis of its admissibility in another case, because the surrounding evidence may be entirely different, and the document properly authenticated and identified in one case, and not in the other. In the case at bar, the identification and testimony regarding these contracts is entirely different from that in the State case cited.

The foregoing jurisprudence of the Supreme Court of Louisiana is so clear, so simple, so in accord with the intent of the parties, and so easily applied to the evidence in any lawsuit, that it certainly should be followed by the Federal Courts, not only because of the ruling of this Court requiring Federal Courts to the jurisprudence of State courts in local issues (*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64), but also because it is so obviously correct.

Conclusion.

This case is of vital importance to every land-owner in a gas producing field, at least in the South. It is of even wider importance to every litigant using the practice of

summary judgment under Rule 56 of the Rules of Procedure for District Courts.

Because of this double importance, we suggest that the matter is of sufficient general importance to justify consideration by this Court.

Respectfully submitted,

G. P. BULLIS,
Attorney for Petitioners.

(7431)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET ALS.,
Petitioners and Plaintiffs.

versus

ARKANSAS NATURAL GAS CORORATION,
Respondent and Defendant.

SUPPLEMENTAL BRIEF OF J. M. SARTOR, ET ALS.,
Petitioners and Plaintiffs,

G. P. BULLIS,
Attorney for Plaintiffs.

AMERICAN PRINTING CO., LTD., 424 CAMP STREET, NEW ORLEANS

SUBJECT INDEX

TABLE OF CASES

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SUPPLEMENTAL BRIEF OF J. M. SARTOR, ET ALS.,
Petitioners and Plaintiffs.

May It Please The Court:

The United States Circuit Court for the Fifth Circuit dismissed this suit on summary judgment against plaintiffs, as shown by its opinion reported in 134 Fed. (2) 433, and plaintiffs seek review under United States Code, Title 28, Section 347.

In this brief, the parties will be designated as in the lower Courts, namely, J. M. Sartor et als. as plaintiffs, and Arkansas Natural Gas Corporation, as defendant.

QUESTIONS PRESENTED

QUESTION No. 1. The use or mis-use of Summary Judgment, as permitted by Rule 56 of the Rules of Civil Procedure for the District Courts of the United States, adopted by this Court on Dec. 20, 1937, said Rule 56 reading in its pertinent part:

> "(b). A party against whom a claim, counter-claim or cross-claim is asserted, or a declaratory judgment is sought may, at any time move, with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) . . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.
>
> (e). Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

(1-a). May a District Court deprive a litigant of trial by jury, by granting summary judgment, when the evidence is conflicting, and summary judgment requires the determination of controverted facts and the weight, sufficiency and effect of evidence?

(1-b). May the *opinions* of witnesses testifying by

affidavit be used as a basis for summary judgment, or must the testimony be on facts only?

(1-c). Is a litigant deprived of due process of law, when hostile witnesses testify to their opinions by affidavit, and the litigant is deprived by the practice in summary judgment, of the right to cross-examine these hostile witnesses as to their qualifications as experts, and the basis of their opinions?

(1-d). When two juries have decided all the facts in a case in favor of plaintiffs, in previous trials, may summary judgment be rendered in favor of defendant on the same facts?

(1-e). The rule states that "pleadings, depositions and admissions on file" shall be used on trial for summary judgment. Does this include documents filed in a previous trial of the same case?

(1-f). May the affidavits of witnesses state the contents of written documents not in evidence?

QUESTION No. 2. Did the Court of Appeals decide an important question of local law in a way in conflict with applicable local decisions, in deciding that land-owners holding leases entitling them to a royalty of one-eighth of the market price of the gas produced, are entitled to the market price at the well, to be determined by the opinions of experts, when the Supreme Court of Louisiana has decided they are entitled to the market price in the field where the gas is produced, to be determined by the sales in the field?

STATEMENT OF THE CASE

The foundation of this suit is a contract of lease between plaintiffs and defendant, whereby plaintiffs granted to defendant the exclusive right to produce oil and natural gas from plaintiffs' land, and defendant agreed to pay plaintiffs one-eighth of the MARKET PRICE of all natural gas produced. (R.5,7). This is the form of lease customarily and commonly used in the natural gas fields of the State of Louisiana and surrounding fields, and we believe elsewhere.

Plaintiffs' land is situated in the Richland Gas Field, which is a small, definitely defined area of land in the State of Louisiana, from which natural gas has been produced in immense quantities. Under the above lease, defendant produced large amounts of natural gas from plaintiffs' land. (R.3).

The parties to this lease did not contract on terms of equality. Plaintiffs are farmers, entirely ignorant of the business of producing and selling natural gas (R.42). Defendant is one of the major gas companies, highly expert in that business.

Defendant reported to plaintiff that the market price of natural gas in the Richland Gas Field was 3c per thousand cubic feet, and paid plaintiffs their one-eighth of this price of the gas produced. (Hereinafter the words "per thousand cubic feet" will be understood after figures of the price of gas.)

Plaintiffs having reason to suspect that 3c was not the market price of gas, brought this suit, asking the Court to determine what was the market price of gas, to which

they were entitled under their lease, for the gas produced in the years 1927 to 1932 inclusive. This suit was filed Mar. 20, 1933, and continuously since has been actively litigated, with three trials in the District Court and four appeals to the Circuit Court. Plaintiffs have had a very hard time securing decision of a very simple issue.

The first trial of this case was before a jury in the year 1934. On this trial, a statement of facts, agreed to by both parties, was filed in evidence, showing that all of the sales of natural gas in the Richland Gas Field during the years 1927 to 1932 inclusive, were made by nineteen written contracts of sale. (R.95,69,44). All these sales, except one trivial sale of drilling gas, were sales to pipe lines which were built into the Field to take gas to distant points where it is used. (R.39,50,65). It is inherent in the nature of natural gas, that it must be marketed, that is conveyed from the place where produced to the place where used, only by pipe lines, not by railroad car or truck. These pipe line sales were sales for delivery over a term of years. Most of them were made in the years 1928 and 1929, and were sales of large quantities of gas.

The price stipulated in these sales, at the receiving stations of the pipe lines in the central part of the Richland field, were 2½c to 7.6c. (R.44,69 to 77).

On this evidence the jury brought in the following verdict (R.17):

> "We, the Jury, find for the plaintiff fixing the market price of gas at 4½ cents for 1927 to 1932 inclusive. Said price to be paid at point of delivery."

On appeal, the United States Circuit Court of Appeal for the 5th Circuit reversed this verdict, on the ground that the District Court had erred in admitting in evidence the 19 written contracts of sales of gas, which were inadmissible because they guaranteed delivery of large quantities of gas. *Arkansas Natural Gas Co. v. Sartor, 78 Fed. (2) 924,928.* How a market price can be proved without proving the sales, and why large sales do not prove market price, the Court has never explained.

On the second trial, in 1937, this ruling of the Court of Appeals was disregarded, and the same contracts of sale introduced in evidence. This was necessary because neither the parties, nor the District Court knew of any other way to prove market price. However, the District Court ruled that plaintiffs' claims for gas produced prior to March 20, 1930 were barred by the statute of limitations (called prescription in Louisiana). Under this ruling the jury on the second trial brought in this verdict (R.21):

> "We, the Jury, find for the Plaintiffs that the average price of gas at the well in Richland Parish, Louisiana field, during the period beginning March 20, 1930 and ending March 20, 1933, to be .0445 per 1000 cu. ft. at 8 oz. pressure."

Both parties appealed from this trial; defendant appealing from the price fixed by the jury, and plaintiffs appealing from the ruling of the District Court barring their claims prior to March 20, 1930. On this appeal, plaintiffs won. The Court of Appeals affirmed the jury verdict; held that plaintiffs claims were not barred; and remanded the case to award to plaintiffs the market price prior to March 20, 1930; the Court of Appeals implying that this might be

done without a new trial, evidently meaning that the price fixed by the jury for gas produced after Mar. 20, 1930 might be applied to the gas produced before that date. *Sartor v. Arkansas Natural Gas Co., 98 Fed. (2) 527.*

Under this remand, the District Court ordered a third trial, to determine the market price prior to Mar. 20, 1930.

It is the proceedings in this third trial, which are now before this Court in the case at bar.

Before the jury was called for the third trial, defendant had the audacity to file a motion for summary judgment, alleging that the market price of natural gas at the well in the Richland Gas Field from 1927 to March 20, 1930 was 3c, and there was no substantial basis for dispute to the contrary. (R.28).

Such a motion seemed impossible and merely dilatory, in the face of two jury verdicts squarely to the contrary, one of which had been upheld by both the District and the Appeal Court; and also the fact that it was now *res adjudicata* in this very case that the market price on March 20, 1930 was 4.45c, and this motion required the Court to hold that one day previous, on March 19, 1930, the price was 3c and there was no evidence to the contrary.

Yet both the District Court and the Court of Appeals sustained this motion.

On the trial of this motion for summary judgment in the District Court, defendant filed 9 affidavits and a pamphlet; plaintiffs filed 2 affidavits; and both parties filed the contracts of sales of gas during the period involved.

This evidence was substantially the same as the evidence laid before the juries in the two previous trials, with one vitally important difference. On the previous trials, plaintiffs were confronted with the fact that since they were farmers, entirely ignorant of the gas business, they could produce no evidence from their own knowledge, and could procure no expert witnesses, because no expert would endanger his livelihood by testifying against a gas company. On the two previous trials, plaintiffs had successfully solved this problem, by compelling their adversaries to produce in Court their contracts, and by cross-examination of defendant's experts. The vitally important fact in the case at bar is that neither of these means of procuring evidence, successful on two jury trials, were permitted by summary judgment procedure.

EVIDENCE ON MOTION FOR SUMMARY JUDGMENT

The documentary evidence consisted on the sales of gas in the Richland Gas Field during the time involved in this trial, from 1927 to Mar. 20, 1930, which were (R.83, 52,68 to 77,96):

1. Sale to Natural Gas & Fuel Co. in 1927 of a trivial quantity of drilling gas for 3c;

2. Sale to Ford, Bacon & Davis in 1926 to 1930 for 4.25c;

3. Sale to Magnolia Gas Co. in 1928 for 3c;

4. Sale to Richland Gas Co. in 1928 for 3½c to 4c;

5. Sale to Memphis Natural Gas Co. in 1928 for 5c;

6. Sale to Southern Gas & Fuel Co. in 1928 for 5c & 6c;

7. Sale to Dixie Gulf Gas Co. in 1929 for 3c & 4c;

8. Sale to Mississippi River Fuel Co. in 1929 for 5c;

9. Sale to Southern Natural Gas Co. in 1929 for 4½c;

10. Sale to Arkansas Natural Gas Co. (Defendant) in 1929 for 4½c.

Each of these (except the first trivial sale), was a sale to a pipe line for delivery continuously over a period of years.

It is undisputed that these were *all* of the sales of gas in the Richland Gas Field during the period of time involved in this suit (R.83), excepted two disputed sales, as follows

Defendant offered two other sales: (No.11), sale to Century Carbon Co., in 1929 (R.77, contract 16), as to which plaintiffs claimed this was not a sale of gas, but was a complicated contract for building and supplying a carbon black plant; (R.85); and (No. 12), a trivial sale to International Gas Products Co. in 1930 (R.76 Contract 14), which plaintiffs claimed was after the time involved in this suit (R.36).

It is noteworthy that plaintiffs were able to produce these private sales of their opponents, only because the sales were in the record from the previous jury trials.

The astonishing feature of this case is that both the District Court and the Court of Appeals expressly refused

to consider these sales (*all* the sales during the period involved) in deciding this motion for summary judgment.

The District Court said: (R.87):

> "Evidence as to pipe line prices, as has been held by both this Court and the Court of Appeals, was admissible only if there was no market at the well, and it appearing from the showing made here without contradiction that there was such a price at the well, the necessity for considering the pipe line contracts or prices and the elements affecing them does not arise in this case."

The Court of Appeals said: (R.107):

> "The pipe line contracts were not admissible to prove market price."

This ruling seems clearly error, which we will discuss in our argument hereinafter.

The pamphlet offered by defendant was merely a government bulletin that the estimated value of natural gas at the wells in Louisiana was 3c in 1927 and 3.3c in 1928, which seems immaterial (R.67).

The lower Courts therefore decided this motion for summary judgment solely on the affidavits, because there was no other evidence. We will therefore offer a brief summary of the affidavits filed by defendant and plaintiffs.

AFFIDAVITS

Defendant offered the following affidavits:

1. D. W. Harris (R.49) swears that he is Vice-President of defendant and negotiated Sale No. 10 above, whereby defendant bought gas from 1929 on at 4½c; that he was informed that gas could have been bought at the well in Richland Gas Field for 3c, but he preferred his 4½c contract because his contract required the seller to transport the gas sold from the well to his pipe line in the field, and to furnish whatever quantities of gas he required; that in affiant's opinion, the market price of gas at the well in the Richland field was 3c. He pads his affidavit with the obvious truth that if he had not been able to buy sufficient gas for his pipe line, he would have been compelled to produce it himself. Plaintiffs objected to this affidavit because it was hearsay; and oral testimony as to the alleged contents of written documents (R.51); and on the merits plaintiffs swore (R.84) that Harris did not state his contract correctly.

2. S. D. Hunter (R:51) swore that he was President of Ouachita Natural Gas Co. and made sale No. 3 above; and in his opinion the prevailing market price for gas in the Richland field was 3c at the well. Plaintiff objected to this opinion, because the witness had not qualified as an expert (R.52).

3. R. H. Hargrove (R.52) swore that he was Vice-President of United Gas Pipe Line Co. and in his opinion the market price of gas at the well in the Richland field was 3c, stating six reasons for this opinion: 1st, there were some sales at 3c; 2nd, some landowners leased their lands with a royalty clause providing that they would receive one-

eighth of the value of the gas produced, calculated at 3c if any gas was produced; 3rd, Gas sold to carbon black plants netted less than 3c; 4th, in the Monroe Gas Field there was an established market price of 3c; 5th, companies with which affiant was associated produced more than half the gas produced in the Richland field, and "the weighted average price of their sales during this period was 3.495c; 6th, in the pipe line sales the seller's obligations under their contracts were so onerous that the net price they realized did not exceed 3c, these onerous obligations being, to deliver the gas from the well to the pipe line receiving station in the field, and to maintain enough reserves and drill enough wells to supply the gas sold. To this affidavit, plaintiff made lengthy objections, especially that it was oral testimony as to the contents of written documents, much of it irrelevant, and the term "weighed average price of sales" is meaningless. (R.56,57). On the merits, plaintiffs swore (R.85), that he did not state the facts correctly.

4. R. H. Hargrove (R.59) swore further to some unimportant details.

5. E. N. Florsheim (R.60) swore that he negotiated sales No. 1 and No. 12 hereinabove recited, which seems immaterial. He swore that 3c was generally considered to be the prevailing price at the well in this field. Plaintiffs objected to this opinion on the ground that the witness was not shown to be qualified to express an opinion as an expert, and the affidavit was oral testimony of the contents of written documents (R.61). By consent this objection and ruling were made general to all opinions (R.61).

6. R. C. Stokes (R.62) swore that he is Chief Clerk of Union Producing Co. and the records of that Company

show that after deducting certain expenses from the gross price received by that company as a seller of gas in the Richland field, the net realization of this corporation, as shown by its books, did not exceed 3c. Plaintiffs objected to this affidavit because it was oral testimony to the contents of books and records, to which plaintiffs had no access, and objected to the deductions as irrelevant because it was the duty of defendant to pay all operating expenses under the lease. On the merits, plaintiffs swore that the affidavit was untrue (R.85).

7. W. C. Feazel (R.62) swore to sales and offers not at the period involved in this suit, and that in his opinion the market price at the well was 3c.

8. C. H. McHenry (R.64) swore that he was secretary of United Carbon Co., and participated in some of the sales to pipe lines, and that these contracts contained onerous conditions; that he made other sales long after the period involved in this suit; and that in his opinion the market price at the well was 3c.

9. R. G. Taylor (R.66) swore that he is Asst. Treas. of Hope Producing Co. which sells gas in the Richland field, and the books of that company show that after deducting various expenses, their net return from sales of gas were less than 3c. Plaintiffs swore (R.47); that this affidavit is untrue.

Plaintiffs objected generally to all of these affidavits and asked that they be stricken from the record, because they did not comply with the requirements of Rule 56 (e). (R.38).

Thus it will be seen that these affidavits consist almost entirely of opinions of oral testimony as to the contents of written documents not in the record; and of irrelevant details.

Yet these affidavits are the sole evidence on which the Court of Appeals based its decision. The opinion of the Court of Appeals, after barring the pipe line sales from consideration, says (R.110):

> "It will serve no useful purpose to enter into an analysis of the supporting proofs offered by movant. It is sufficient to say that they establish without contradiction or question of any kind that in the early years of the field involved in this suit, there was a market price for the gas at the well, and that that market price was never at any time during any of the years in question in excess of the 3c which defendant consistently paid plaintiffs."

We respectfully suggest that this is clearly an erroneous statement of the affidavits.

The Court of Appeals could arrive at its holding that there is "no contradiction or question of any kind", only by elimination from consideration, and disregarding, not only all of the sales of gas during the period involved but also the two affidavits filed by plaintiffs (R.33,42). These two affidavits, while not pretending to be made by gas experts, did swear to facts contradicting every fact offered by defendant. Since these affidavits are unquestionably in the record, it is impossible to say there was no question or contradiction. The decision as to which of conflicting evidence should be accepted, seems clearly a jury function.

The opinion of the Court of Appeals holds that there was a market price at the well, but there was never any sale at the well during the period of time involved in the suit, except the trivial sale of drilling gas in 1927 shown in sale No. 1.

The lower Courts could have arrived at the market price at the well, very simply. The pipe line prices show the market price at the delivery points in the center of the field. The cost of transporting gas from the wells to these delivery points was 3/10 of 1c or .3c (R.77, stipulation 2). So deducting .3c from the pipe line prices hereinabove stated, would give the well prices. But this would be much more than 3c.

Neither the District Court nor the Court of Appeals mentioned the fact that two juries, on substantially the same evidence (except cross-examination of defendant's witnesses), have given heavy verdicts for plaintiffs; one of which was upheld by both Courts; nor the situation resulting from their verdict, that on March 19, 1930 the market price of gas in the Richland field was 3c, without contradiction or question of any kind, and one day later, on March 20, 1930, it was 4.45c.

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in granting summary judgment.

2. The Court of Appeals erred in failing to follow the jurisprudence of the Supreme Court of Louisiana, that the market price of gas is the price of sales in the field where produced.

SUMMARY OF ARGUMENT

Question No. 1.

1. Summary judgment is impossible in this case, because there are disputes as to the facts, and the credibility of witnesses, on which plaintiff is entitled to trial by jury.

2. Defendant's affidavits do not comply with Rule 56 (e) because they are composed mainly of opinions, hearsay and oral testimony regarding written contracts.

3. Summary judgment is a drastic innovation which can easily be mis-used, to deny trial by jury.

4. It is respectfully suggested that jurisprudence be handed down clarifying the rules on summary judgment, forbidding opinions in afidavits, and reconciling summary judgment with the right of cross-examination of adversaries and hostile witnesses.

Question No. 2.

1. The term "market price" in the lease sued on, is clear and easily determined.

2. The Supreme Court of Louisiana has settled the jurisprudence for this case, that the market price is the price of sales in the gas field.

3. The Court of Appeals failed to follow this local law.

4. The decision of the Court of Appeals makes it impossible for a land-owner to litigate with an experienced gas company.

ARGUMENT.

In this argument, we will briefly discuss the two questions in order.

1. Summary Judgment.

This Court has never adjudicated the practice under Rule 56, since it was adopted in 1937.

The leading authority we find on the law of this case is *Whitaker v. Coleman, 115 F. (2) 305:*

> "The invoked procedure (motion for summary judgment under rule 56), valuable as it is for striking thru sham claims and defenses which stand in the way of a direct approach to the truth of a case, was not intended to, and cannot, deprive a litigant of, or encroach upon, his right to a jury trial. Judges, in giving its flexible provisions effect, must do so with this essential limitation constantly in mind.
>
> To proceed to summary judgment, it is not sufficient that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that, conceding its truth, it is without legal probative force . . . . .
>
> Summary judgment procedure is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of a trial. It is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from

their right of trial by jury, if they really have evidence which they will offer on the trial; it is to carefully test this out, in advance of trial, by inquiring and determining whether such evidence exists. It is quite clear that technical rulings have no place in this procedure."

This leading opinion was written by Judge Hutchinson of the 5th Circuit Court of Appeals, who decided this case at bar against plaintiffs. We respectfully suggest that the learned Judge erred in applying his clearly and strongly expressed law to the facts in this case.

The case at bar seems a perfect example of the misuse of summary judgment by a skillful and clever litigant seeking to evade trial by jury.

Defendant, having lost two jury trials and being on the verge of losing a third, took a desperate gamble by this motion for summary judgment, to escape having to stand before a jury a third time. Defendant's affidavits are cleverly drawn to create a factual impression, and ring with the authority and cock-sure certainty of the big business executives who signed them in the privacy of their offices. This almost hides the defect that their "punch" has no facts or law behind it.

We think these affidavits should have been stricken from the record on plaintiffs' motion (R.38 Par.10), because they violate Rule 56 (e) above quoted. This rule requires affidavits to contain only facts admissible in evidence. Defendant's affidavits are almost entirely opinions, which are not facts, and hearsay and oral evidence regarding the contents of written documents, which are not admissible under the rules of evidence.

It is difficult to imagine a case where summary judgment is more impossible, legally, than the case at bar:

1. The prices of every sale of gas are in the record, and it is a jury function to convert their variety of prices into one market price.

2. Defendant's affidavits are fatally defective, as above stated.

3. Every fact favorable to defendant's claims, in defendant's affidavits, is expressly and positively disputed in plaintiffs' affidavits. For example, defendant's affidavits recite the contents of written documents, and plaintiffs' affidavits squarely deny these recitals. It is a jury function to decide these disputes.

4. The men who signed defendant's affidavits are oficers and employees of defendant or of associated companies engaged in the production of gas in the Richland Gas Field and having a common interest against that of the farmer land-owners. The effect of this, and the weight to be given their testimony and opinions, is pre-eminently a jury function.

5. We have in this case the extraordinary situation that twice earlier in the case a jury has heard all the evidence, listened to all of defendant's witnesses testifying as they did in these affidavits, and have decided strongly in favor of plaintiffs. We ask the Court to read, for example, the verdict of the first jury (R.17), which is, that the market price of gas was 4½c during all of the years from 1927 to 1932. It is true that the Court of Appeals upset this verdict on a technicality, but certainly, in the face of this ver-

dict of 4½c, it is impossible to say, as defendant says in this motion, that there is no substantial evidence favorable to price above 3c.

6. It is *res adjudicata* in this case, by virtue of the jury verdict in the second trial, and the decree based on that verdict (R.24), that the market price on March 20, 1930 was 4½c. Defendant's motion for summary judgment would require the Court to hold that one day earlier, on March 19th, 1930, the market price was 3c, and that there is no dispute to the contrary; because if the market price was over 3c at any time during the period from 1927 to March 20, 1930, plaintiffs would be entitled to jury trial for that time.

We therefore respectfully suggest that defendant's motion for summary judgment in this case be denied.

Turning to the larger aspects of Summary Judgment, we respectfully suggest that this case shows a possibility, a tendency, a danger that powerful and expert litigants will use Rule 56 to deprive weaker adversaries of trial by jury.

Since the days of King John and Magna Charta, there has been a perpetual conflict between those who want trial by a jury of their peers, and those to whom such a trial is anathema. The 7th Amendment to the Constitution of the United States settled this conflict for Federal Courts, but did not prevent clever lawyers from trying to evade its mandate.

Summary judgment is a new and drastic remedy in Federal Courts. It permits a judge to deny to any litigant,

trial by jury. It practically bars a litigant from cross-examining hostile witnesses, or the examination of his adversary under oath. It permits a litigant to have his witnesses testify in privacy, and to put their testimony in perfect form, without having the witness disturbed by sitting on the witness stand before a jury and adverse attorney. Summary judgment lends itself well to those who seek to "make the worse appear the better case", especially to powerful litigants enjoying highly skilled attorneys and experts, who can prepare a trial in their offices, without danger that a witness may say too much, or put his testimony weakly.

Such tremendous power is easily abused. We hope, for the sake of the millions of people to whom trial by jury is precious and necessary, that the Court will block the tendency shown in this case to use Rule 56 to evade trial by jury.

We have the temerity to express the humble opinion that it would be timely and extremely helpful to justice if the Court would state in the clearest, strongest jurisprudence that Rule 56 must not be used when there is any dispute whatever as to the facts, or when any question whatever arises as to the credibility of witnesses or the weight to be given to testimony:

2nd. That opinions be barred from affidavits under Rule 56. It is a fundamental rule of evidence, that when a litigant seeks to offer the opinion of an expert, his adversary has a right to cross-examine as to qualifications as an expert, and to cross-examine the expert as to his testimony. This is practically impossible under Rule 56. Also the weight to be given to expert testimony seems to be a jury function.

3. A practical method should be evolved to permit a litigant against whom a motion for summary judgment is filed to cross-examine the hostile witnesses who give affidavits against him. It may be said that such a litigant could go back to these hostile witnesses, hunt them up all over the country, and compel them to appear at a later time and give deposition under Rules 30 or 31. Doubtless the Judge would give a delay to permit this, under Rule 56 (f). While this is possible, it is not practical, on account of the great expense, trouble and difficulty of forcing a hostile witness to appear before a Notary for cross-examination, and the difficulty of extracting information from an unwilling witness under those conditions.

The rules of Civil Procedure for District Courts, adopted by this Court in 1937, go a long way in favor of those who dislike trial by jury, in that Rule 38 abolishes the old practice that a trial by jury was automatically had unless specially waived by both parties in writing; and substituted the rule that a jury trial can be had only when specially asked for within a sharply limited time.

Rule 56 goes further in leaving it to decision of the Judge whether or not a litigant shall have a jury trial.

We earnestly suggest that the rules should not go any further in that direction. Summary judgment is a useful practice in many cases, but the remedy will be worse than the disease if it is used to abridge the constitutional right of jury trial, which is so vitally important to the average citizen.

SECOND QUESTION.

The second question in this case is, the failure of the Court of Appeals to follow the local jurisprudence in determining how the market price to which the plaintiffs are entitled under the lease sued on, shall be determined.

This question is not of such universal importance as Summary Judgment, but it is vital importance in every natural gas field in the nation, especially to the landowners from whose land natural gas is produced.

This question arises as follows: in the lease sued on, defendant agreed to pay plaintiffs one-eighth of the "Market Price" of all gas produced.

We earnestly ask this Court, for the sake of the myriad of land-owners who must collect royalty from the big gas companies, to clear up the confusion into which this jurisprudence has fallen. That the jurisprudence is in confusion is shown by the decision of the Court of Appeals in this case, that in determining the market price, all sales of the gas must be disregarded, and the price decided by the affidavits of gas company officials. It certainly must be error to hold that bone fide sales are to be ignored in determining the price of the thing sold.

The problem seems on its face, simple. Every school boy knows that the price of an article is what it sells for.

In two cases, *Muser v. Magone, 155 U. S. 240, 249,* and *Cliquot's Champagne, 3 Wall. 114, 125,* this Court defined Market Price as follows:

> "Such prices as dealers in the goods are willing to receive and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

In *United States v. Miller, 317 U. S. 369,374,* this Court said:

> "It is usually said that market value is what a willing buyer would pay in cash to a willing seller."

However, the case at bar is on all fours with and is settled by the case of *Wall v. United Gas P.S. Co., 178 La. 908, 152 So. 561,* decided by the Supreme Court of Louisiana. The case at bar is a Louisiana case.

In this *Wall* case, the highest court of Louisiana had before it a lease in which the royalty clause read as follows:

> "The grantor shall be paid one-eighth (1/8) of the value of such gas, calculated at the market price per thousand feet, corrected to two pounds above atmospheric pressure."

By referring to the lease in the case at bar (R.7) it will be seen that the lease at bar reads exactly the same, except that our lease stipulates a 3c minimum.

The issue in the *Wall* case was the same as in the case at bar, namely, how shall "Market Price" be determined. The Supreme Court of Louisiana said:

> "In the lease contract here involved, the lessee was required to pay to the lessor one-eighth of

> the value of the gas sold off the premises, calculated at the "market price" thereof. The price to be paid was left open, or made to depend upon the "market price" at the time the gas was produced . . . . . There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether "market price" meant the price at the well or the price the gas would bring in a market remote from the well. We think it reasonable to assume that the parties intended that, if there was a market for gas in the field, the current market price there would be paid."

In this case the Supreme Court of Louisiana also cited as authority the definition given by this Court above quoted.

The Supreme Court of Louisiana expressly approved and affirmed this *Wall* case, in the later case of *Sartor v. United Carbon Co., 183 La. 287, 163 So. 103;* and that Court has never changed this jurisprudence.

Under the well known principle enunciated by this Court in *Erie R. R. Co. v. Tompkins, 304 U. S. 64*, this interpretation is binding on the Federal Courts.

As the Supreme Court of Louisiana correctly states, this being a suit on a contract, the function of all Courts is to ascertain and enforce the intentions of the parties. It seems obvious that the intention of the parties was as that Court says, the market price in the field where the gas is produced.

Hence, even without the doctrine of *Erie v. Tompkins*, this Court would approve that jurisprudence because it is so clearly correct.

Applying this interpretation to the case at bar, the result is simplicity itself. It is undisputed that the sales enumerated above in this brief are all of the sales made in the Richland Gas Field during the period of this suit, and are genuine, bone fide sales. All that is necessary is for a jury to name a figure for the market price in the field which the jury thinks is the fair average of those sales. It will be observed that this is exactly what the jury did in the two jury verdicts shown in this case.

We ask your Honors to declare this jurisprudence of the Supreme Court of Louisiana to be the law of this case. We respectfully request that your Honors remand this case with instructions that the sales be laid before a jury on the evidence of these sales, unincumbered with opinions of the high officials of defendant.

Turning to the opinion of the Court of Appeals for the 5th Circuit here under review (R.105), it will be seen that instead of the above simple rule, that Court laid down a complicated formula for ascertaining market price, including opinions of gas company officials, leases, etc.

Why does such a discrepancy exist between the ruling of the Supreme Court of Louisiana, and the Federal Court of Appeals? The answer is that the clever and resourceful attorneys for defendant did a masterly job of confusing the issues before the Court of Appeals. We have the deepest respect for the Court of Appeals, an extremely able Court, but in all respect we say, in this case the Court got lost in the fog created by defendant.

When this case was first tried, it was apparent that it was a simple case, as we have above stated, and that de-

fendant must pay a big additional sum to plaintiffs and to the other land-owners in the Richland field. When defendant itself was buying gas in the field in large quantities for 4½c, it could hardly claim the market price was 3c.

So the able attorneys for defendant followed the well-known rule of practical law: "When the facts and the law are against you, confuse the issues."

To confuse the issues, defendant invented two new concepts, each untrue, but sufficiently plausible to use.

The first concept was that the market price of natural gas in the Richland Gas Field is different from the market price at the well in that field. There is no such difference. The Richland Gas Field consists of a definite area of land, thickly studded with wells producing natural gas. The market price of gas is the same at every spot in the field. There could not be one market price at a well and another market price at a point half way between one well and the next. To say that there are two market prices, one the market price in the field, the other the market price at the well, is just as unreasonable as to say there are two market prices for wheat in Chicago, one market price at elevators in the north end of Chicago, a different market price at elevators in the south end of Chicago.

The second concept originated by defendant was equally false. It was that these sales of gas were unique, extraordinary, and imposed unusually onerous conditions on the seller.

The best answer to this is that these sales are all the sales of gas. Since these sales are all the sales, they are

the sales in the ordinary course of business, which fits the definition given by this Court above quoted:

> "Such prices as dealers in the goods are willing to receive and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade." *Muser v. Magone, 155 U. S. 240, 249.*

Since these are all the sales, they must be the ordinary course of trade.

Furthermore, when defendant's vice-president, Mr. Harris, testified (R. 49), while he strongly claimed that these pipe line contracts were extraordinary, yet all he could point out was that in them the seller delivered the gas from the wells in the Richland field to the point in the center of the field where the pipe lines had their receiving stations; and that the seller had to keep up his wells to supply the gas he had sold. Certainly neither of these requirements are extraordinary. Every seller has to keep up his supply of what he sells.

The falseness of these claims is further shown by the admission in the record (R. 77, Stipulation 2) that the cost of delivering gas from the wells to the receiving stations of the pipe lines, was 3/10 of 1c (.3c) per thousand cubic feet. So if there were any merit in the claim that the market price at the well is different from the market price in the field, the difference would be just this .3c, which is a small item.

However, it would be grossly unfair to deduct this .3c cost of transporting gas within the field itself from the market price to plaintiffs, because the essence of the con-

tract of lease is that defendant will do all the work and bear all the costs of producing and marketing the gas, and for that receives the lion's share, 7/8th, of the gas produced. Hence it would be contrary to the letter and the spirit of the lease (R. 5), to assess this charge against plaintiffs.

Defendant had only these flimsy pretenses with which to create fog and confusion. But the resources of a big gas company are great, and defendant's officers, associates and employees kept reiterating the statement, that the obligations of the sales were onerous, and the market price must be at the well, with all the weight and authority of big business executives, until they actually misled the Court. Not once did defendant ever explain the merits of his claims. We have repeatedly challenged defendant to go into an explanation of why plaintiffs are entitled to the market price at the well, or why the price at the well differs from that in the field, or just why the sales contracts are onerous above the load that every seller carries. Never does defendant or its affidavits answer our criticisms.

However, the Court of Appeals was misled by this campaign of confusion put on by defendant, and handed down a decision which makes it impossible for any landowner anywhere to litigate in Court with a gas company about the amount of royalty due him, under leases like that here at bar, which constitute much of the leases under which gas is produced.

The Court of Appeals has never made any explanation of why it rejects the contracts of sale as proof of market price, except the statement quoted at the beginning of our brief, in the first decision of this case, *Sartor v. Arkansas Nat. Gas Co., 78 F. (2) 924*, that the contracts

were inadmissible because they guarantee delivery of large quantities of gas. The Court of Appeals has never explained this further, and no one else is able to explain it. There would seem to be no reason why large sales would not be even better than small sales, to prove the market price of an article.

So the Court of Appeals in its decision here under review arbitrarily rejects all of the sales of gas in the field as any proof whatever of market price, and in effect strikes out of plaintiffs' lease the stipulation that plaintiffs shall receive market price, and holds that what plaintiffs are entitled to is the value at the well, to be determined by the opinion of experts, etc. (R. 107).

The Court of Appeals does not mention in its decision, the decision of the Supreme Court of Louisiana in the *Wall* case above cited. The Court of Appeals does mention the decision of that Court in *Sartor v. United Gas P. S. Co., 186 La. 555, 173 So. 193.* In that case the Supreme Court of Louisiana did hold some of the contracts of sale involved in this suit, to be inadmissible in evidence, in that case, but did not overrule or change in any way its previous decision in the *Wall* case. A ruling of a court that certain documents are not admissible in evidence on a certain trial, does not establish jurisprudence or become subject to the rule of *stare decisis*, because in no two cases is the evidence just alike, and on another trial, with the documents explained and authenticated in a different way, the same contracts might be held by the same Court to be admissible.

The decision of the Court of Appeals here under review is ruinous to all land-owners, because it establishes a species of evidence as necessary for determining market

price, that only a gas company can furnish. It requires expert testimony to prove all the factors entering into the value of the gas at the well.

If this decision of the Court of Appeals becomes the fixed and final jurisprudence of Federal Courts, then no landowner can litigate with a gas company producing gas from his lands, and will have to accept whatever royalty the gas company sees fit to give him, because he cannot produce the expert evidence held to be necessary.

On behalf of landowners in gas fields everywhere, we beg of the Court not to fasten on us forever the impossible, complicated burden of proof fixed in the decision of the Court of Appeals. Instead, we submit that the jurisprudence laid down by the Supreme Court of Louisiana in the *Wall* case, cited above, should be made the jurisprudence of the Federal Courts: that is, the simple, easy, obvious rule, that market price is to be determined from the price in bona fide sales and nothing else. This enables landowners to litigate on terms of equality, because they can easily procure evidence of the sales, as they did in the case at bar.

CONCLUSION.

Plaintiffs, J. M. Sartor, D. R. Sartor and Mrs. Earline Sartor pray that the judgment of the District Court be reversed; that defendant's motion for summary judgment be rejected; and that the case be remanded for trial by jury in the District Court.

Respectfully submitted,

G. P. BULLIS,
Attorney for Plaintiffs.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET ALS,
Petitioners and Plaintiffs.

versus

ARKANSAS NATURAL GAS CORPORATION,
Respondent and Defendant.

On Writ of Certiorari to United States Circuit Court of Appeals for The Fifth Circuit

SECOND SUPPLEMENTAL BRIEF OF PETITIONERS AND PLAINTIFFS

G. P. BULLIS,
Attorney for Petitioners and Plaintiffs.

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SECOND SUPPLEMENTAL BRIEF OF PETITIONERS AND PLAINTIFFS

MAY IT PLEASE THE COURT:

Respondent, Arkansas Natural Gas Corporation, has filed a supplemental brief since oral argument which contains serious misstatements of fact.

Plaintiff's affidavits (R. 83), stated that the sales there listed were *all* the sales of gas in the Richland Gas Field during the period involved in this proceeding (1927 to March 20, 1930), except two sales claimed by defendant's witness Florsheim which plaintiff disputed for reasons stated (R. 36, 47). We showed that these were all sales under pipe line contracts except a trivial sale of drilling gas in 1927 (R. 36, 39, Par. 14) (Stipulation of Facts, R. 69 to 79).

Respondent's brief, at page 4, states that there are other contracts in evidence. The brief fails to state that these were all after March 20, 1930, the period involved in this suit. It is true that after March 20, 1930, several sales were made at 3c or at 2½c, but these were during the period of time in which the jury found the market price, despite these sales, to be 4.45c which is res adjudicata.

Plaintiffs' affidavit was prepared with care, and no other sales will be found anywhere in the record during the period involved in this hearing.

Respondent's brief criticizes the fact that counsel for plaintiff made affidavit. No lawyer likes to make affidavits in his own case, but the hard necessities of summary judgment left no alternative, because plaintiffs could not procure gas experts. This affidavit merely testifies to the contents of the record in this suit, which is certainly a fit subject for lawyer affidavit.

COURT OF APPEALS DECISION HERE UNDER REVIEW

With reference to the questions raised in oral argument regarding the decision of the Court of Appeals here under review (R. 105-110), that Court states the legal basis for its decision as follows:

> (R. 107): "In the meantime, this Court, in Sartor v. United Gas Public Service Co., 84 Fed. (2) 436, again holding as it had held in Arkansas Natural Gas Co. v. Sartor, 78 Fed. (2) 924, that the pipe line contracts were not admissible to prove market price, and that plaintiffs were entitled to receive for the gas, not the pipe line prices, but the market price at the well, laid down the rule that the object and purpose of the inquiry in a case of this kind is to determine (1) the market price at the well, or (2), if there is no market price at the well for the gas, what it is actually worth there.
>
> (R. 108): Subsequent to the decision in this case (In Supreme Court of Louisiana), there were three other gas recovery cases decided in this Court. Pardue v. Union Producing Co., 117 Fed. (2) 225; Driskell v. Union Producing Co., 117 Fed. (2) 229, Hemler v. Hope Producing Co., 117 Fed. (2) 231. In all of these cases, the rules heretofore stated were reaffirmed, and though in the Pardue case it was declared that the proof defendant had made of a few sales at the wells was not sufficient to establish a market prices there for the whole period of the suit, the court reaffirmed the principle that if the evidence had established such a market price, resort to the pipe line contracts and other such testimony to estab-

lish the value of the gas could not have been admissible."

Thus it will be seen that the Court of Appeals, in the decision here under review bases its decision on two findings of law:

1. The pipe line contracts (which are all of the sales of gas during the period involved in this suit, except a trivial sales in 1927), are not admissible in evidence to prove market price.

2. Plaintiffs, and all land-owners, are entitled, not to the market price in the field where the gas is produced, but to the market price at the well where produced, or if there were no sales at the well, then to its value there.

These holdings seem, on their face, to be contrary to reason and logic. What reasons does the Court of Appeals give for these holdings of law?

In the case here under review, the sole reason given is that the Court has so decided in two previous cases, stare decisis.

Turning to those two cases for explanation, let us see what they said on the first point, that the pipe line contracts are not admissible in evidence.

The first of these cases is the appeal taken in the case now at bar from the first jury verdict in favor of plaintiffs, decided by the Court of Appeals in 1935, in *Arkansas Natural Gas Co. v. Sartor, 78 Fed. (2) 924.* In that case, the Court of Appeals said *(78 Fed. (2) 927):*

"As applied to this case, the term "market price" is interchangeable with the term "market value". In the nature of things there could be no open market for natural gas. It is admitted that there are no exchange quotations or other evidence to be obtained of open and notorious market prices at which any one desiring gas could purchase it, as would be available in the sale of other commodities. In this situation, the modern rule is that value may be shown by evidence of other sales, provided the conditions are substantially similar (Citing cases). Other sales may be shown by verbal testimony, as well as by documentary evidence. In fact, oral evidence is, in many cases, preferable since, if nothing but the deed is produced, there is no opportunity to cross-examine the parties to the sale to determine whether the price is fair. Jones, Evidence Civil Cases. Sec. 168.

It is also well settled that value may be shown by the opinion of any competent person having knowledge of the facts, whether an expert or an ordinary witness. In Montana Ry. Co. v. Warren, 137 U. S. 348, 353 it was said: "At best, evidence of value is largely a matter of opinion". (Citing other authorities).

We respectfully suggest that the Court of Appeals here went astray by overlooking the difference between finding the market price of a commodity, like gas, and a tract of land. In the case of commodities, the actual commodity is sold, and the price is proved by the sales; in the case of land, the inquiry is about the market value of a tract of land which has not been sold, hence the only way to find the value is for experts to testify regarding sales of other lands.

Continuing in this same decision, we get down to what the Court said about the pipe line contracts being inadmissible in evidence, as follows: *(78 Fed. (2) 928)*:

> "Applying these rules, it is apparent that the contracts offered by plaintiff were inadmissible. The facts that delivery was made at pipe lines instead of the well, and that the prices shown were for gas at a pressure of 8 ounces, instead of 2 pounds, would not be serious objections, if that were all. Under the stipulations in the record above set out, the jury could have ascertained the value of the gas at the well by a simple calculation. However, this is not true as to the other features of the contracts offered. In this case, the lessors were under no obligation to deliver any gas at all nor to guarantee that the land would produce any definite quantity annually or over a period of time. In fact, as production was declining, they were not in a position to do so. The undisputed testimony supports the conclusion that the guaranty to deliver large amounts of gas formed part of the consideration for the prices paid, in the contracts that were admitted. There was no possible way the jury could determine accurately how much this amounted to, and it was not within their province to guess at it."

Ever since this decision was rendered in 1935, we have tried to understand it, without success. What have the lessors to do with the market price of gas? They are farmers who leased their land to defendant for gas production, and have nothing to do with the production or marketing of it. Why does the fact that these pipe line contracts are sales of large quantities of gas make them inadmissible in evidence? It would seem that large sales

would be better evidence of market price of gas, than small sales.

We have repeatedly inquired of the Courts, have repeatedly challenged opposing counsel, who provoked the ruling, to explain it. Neither the Courts nor opposing counsel have ever even remotely mentioned the verbiage of this decision, or attempted to explain it. In our petition to this Court for writ, we stated that the opinion seemed unintelligible, but respondent has never mentioned it.

The second case cited by the Court of Appeals, in the decision here under review, as settling the law that the pipe line contracts are not admissible in evidence, is *Sartor v. United Gas Public Service Co., 84 Fed. (2) 436*, decided by this same Court of Appeals in 1936, on issues identical with those here at bar.

In this second case, the Court affirmed the rule that pipe line contracts were not admissible in evidence, holding it to be stare decisis under the previous decision above quoted, and that all discussion was foreclosed the Court refusing to reconsider the holding. However, the Court held that gas company officials who negotiated these pipe line contracts might be called on to state what the prices were. Having a witness testify orally to the contents of available written documents seems to violate elementary rules of evidence. The Court did not explain this. The Court of Appeals in this case originated a new viewpoint of these pipeline contracts of sale, saying: *(84 Fed. (2) 440)*:

"On another trial, the jury should therefore be carefully instructed, among other things, that the prices the producer is obtaining for gas under his pipe line contracts are not true daily market prices. They are the prices paid under long-term contracts, entered into years before, and therefor have a bearing on the issue to be tried, not as representing fixed daily market prices, but merely to aid in arriving at a conclusion as to the fair value at the well, from day to day, of the gas taken from plaintiffs' well.

In determining market price, or value, a mere matter of opinion in a case like this, fixed and rigid rules do not govern. The object and purpose of the inquiry in this case is to determine; (1), if it can be done, the daily market price at the well, or at the nearest market, less the cost of getting it there. (2) If there is no daily market price, the object is to determine what the gas is actually worth at the well."

Needless to say, a land-owner could not produce the evidence required by the Court of Appeals, hence this jurisprudence practically bars a landowner from suing an expert gas company on a lease.

The idea that a day-by-day market must be proved, was originated by the Court. It was never suggested by any of the parties or witnesses. The Court of Appeals seems obviously in error, because the fact that natural gas can be marketed only through pipe lines on long term contracts, makes a day-by-day market entirely impossible. The Court errs in applying to natural gas the same rules as to stock market securities.

We respectfully submit that this shows the inherent difficulty of the Court of Appeals. The Court overlooked the fact that the market price of any commodity is, as said by this Court in the case of *Muser v. Magone, 155 U. S. 240, 249:*

> "Such prices as dealers in the goods are willing to receive and purchasers are made to pay, when the goods are bought and sold *in the ordinary course of trade.*" (Italics ours)

The Court of Appeals overlooks the fact that *the ordinary course of trade* for natural gas is long term sales of pipe lines: exactly the sales shown in the case at bar.

This is inherent in the nature of natural gas. It cannot be transported to market by railroad cars or trucks on highways. It can be marketed only by pipe lines. Pipe lines are expensive, and will not be built until the builder has a contract with a gas producer to furnish gas over a long enough time to repay the cost of the pipeline with a profit. Gas can be marketed in no other way; and every sale produced in this case, with one or two trivial exceptions, is based on that course of trade. Hence, these long-term pipe line sales are what fixes the market price of gas. The parties to the lease could not have contemplated any other market.

It will be thus seen that the revolutionary and apparently impossible ruling of the Court of Appeals—that in determining the market price of gas, all the actual sales of gas are inadmissible in evidence—rests on only one crytic, unexplained sentence in a decision in 1935 which the Court has refused to reconsider or explain since.

The second ruling of law made by the Court of Appeals in the decision here under review, namely, that plaintiffs are entitled not to the market price in the field where the gas is produced, but to the market price at the well, is equally unexplained by the Court.

In the above cited case of *Sartor v. United Gas Public Service Co., 84 Fed. (2) 440*, the Court of Appeal said:

> "We agree with the District Judge in the view he took in the Arkansas Natural Gas case and in this, that plaintiffs were entitled to receive for the gas the market price at the well, and not the market price in the field."

This is an arbitrary dictum by the Court of Appeals, for which the Court has never given any explanation, in any case.

As we have shown in our previous brief, there cannot be two market prices for gas in the little area constituting a gas field. Hence the market price in the field, and the market price at each well in the field must be the same.

The Supreme Court of Louisiana has expressly so decided in the case of *Sartor v. United Carbon Co., 183 La., 287, 163 So. Rep. 103*, in which that court had under review a lease similar to the lease at bar, and said:

> "This Court, in the case of Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561, held that the language in the lease which required the royalty to be paid on the basis of the market price at well was synonymous with the market price at the field where the gas was produced."

Hence when the Court of Appeals, in the decision here under review, repeats frequently and bases its decision on the statement that the market price at the well, not the market price in the field, must be proved, the Court is making an arbitrary dictum not explained by any reason or logic stated by the Court, and contrary to the jurisprudence of the Supreme Court of Louisiana.

We might mention also that both of these rulings of law by the Court of Appeals are contrary to the admissions of both parties in their pleadings.

Plaintiff, in his petition or complaint said (R. 3, paragraph 7):

> "No open market, or public bidding, and no published prices have ever existed for natural gas in the State of Louisiana, hence its value and market price, to which petitioners are entitled under said contract (of lease), could be ascertained only from sales made by defendant and other producers . . ."

Defendant answered this as follows (R. 13, paragraph 7):

> "It is admitted, however, that there has never been any public bidding or published prices for natural gas in Louisiana, it not being the custom to establish prices for natural gas in that manner; but defendant avers that the value of the gas produced from the lease described in paragraph one of plaintiffs' petition based on *the generally recognized fair market price* for natural gas in the Richland field was three cents (3c) per thousand cubic feet, computed at two pounds above

atmospheric pressure, *this being the price at which the pipe line companies, which bought the bulk of the gas from the producers, were accustomed to pay, to the producers throughout the field.*" (Italics ours).

Thus defendant in its pleadings admits that the market price is fixed by the pipe line sales, and that the sales throughout the field fix the price. Possibly this explains why the able counsel for respondent, who is skilled in all natural gas matters, has never attempted to explain or defend or even refer to these rulings of the Court of Appeals.

To complete the jurisprudence of the Court of Appeals, we call attention to the appeal taken in this same case now at bar, from the verdict of the second jury, to the Court of Appeals. The Court of Appeals decided this in *Arkansas Natural Gas Co. v. Sartor, 98 Fed. (2) 527.* On this appeal, the Court had before it substantially the same record and evidence as in the first appeal quoted at length hereinabove (R. 43). Yet the Court affirmed the jury verdict, without explanation.

Conclusion

We respectfully suggest that this jurisprudence of the Court of Appeals in the case under review is clearly erroneous.

Respectfully submitted,

G. P. BULLIS,
Attorney for Petitioners and Plaintiffs.

BRIEF FOR RESPONDENT

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET AL., PETITIONERS,

vs.

ARKANSAS NATURAL GAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT

H. C. WALKER, JR.,
LEON O'QUIN,
ARTHUR O'QUIN
ELIAS GOLDSTEIN,
Attorneys for Respondent.

INDEX

REFERENCE TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN COURTS BELOW:

Sartor v. Arkansas Natural Gas Corporation, 46 Fed. Sup. 111;
Sartor v. Arkansas Natural Gas Corporation, 134 Fed. (2d) 433.

TABLE OF CASES:

STATEMENT OF THE CASE.

As originally projected, this was a suit by some of the lessors under a Louisiana oil, gas and mineral lease to compel the lessee to pay them for their one-eighth of the gas produced from the lease a price greater than 3¢ per thousand cubic feet. The price stipulated in the lease was "market price", which in Louisiana has been uniformly held to be market price at the well where the oil or gas is produced.

Originally the claim of petitioners related to gas produced during the years 1927 to 1932, inclusive; but after four trials in the district court and four adjudications by the Court of Appeals for the Fifth Circuit, all issues were eliminated except the one issue of the market price of gas at the well in the Richland Parish Field during the period beginning with the year 1927 and ending March 19th, 1930. The respondent, believing that no reasonable basis existed for dispute as to the market price of gas at the well in the Richland Field during this period, filed a motion for summary judgment in its favor (**R. 28**), averring that during this early period there was a market at the well for gas, which market was 3¢ per MCF calculated at two pounds above atmospheric pressure.

In support of this assertion the respondent further averred:

(a) That of the oil and gas leases in the Richland Field more than ninety per cent thereof stipulated a price as between the lessor and lessee of 3¢ per MCF and that in practically all cases where any higher price had been paid for royalty gas such higher price was the result of a compromise between lessor and lessee as to the continued existence of the lease;

(b) That substantially all of the gas that was sold by independent operators and well owners in the Richland Field during this period was sold at 3¢ or less and respondent named in the motion a number of independent operators who had made such sales;

(c) That at all times during this period there had been maintained an open market for gas at the well in the Richland Field at the price of 3¢ per MCF; and

(d) That the Richland Field was only a few miles distant from the much larger and more important Monroe Field which was producing large quantities of gas before the Richland Field was brought in; that the price of gas in the Richland Field was largely determined by the price of gas in the Monroe Field and that there had been for years an established wellside price for gas in the Monroe Field of 3¢ per MCF, which was generally recognized to be the prevailing and settled market price of gas at the well in both the Monroe and Richland Fields;

(e) That in a suit brought by these very petitioners entitled "Mrs. Janie May Sartor, et al. v. United Gas Public Service Company", 186 La. 555, 173 So. 193, the Supreme Court of Louisiana had decided that the market price at the well in the Richland Parish Field did not at any time exceed 3¢ per MCF; and

(f) That the bulletins issued by the United States Department of Commerce, Bureau of Mines, dealing with natural gas during the years 1927, 1938, 1939 and 1930 showed that the average prevailing wellhead price of gas in the State of Louisiana for this period and each part thereof was 3¢ per MCF or less.

Respondent attached to its motion the affidavits of persons of the highest credibility and the most comprehensive information concerning the production of gas from the Richland Field during the period referred to and the maintenance of a wellhead market in that field and the established price at the well in that field, all of which affidavits supported the averments of the motion.

The petitioners (respondents in rule) opposed the motion by asserting that "summary judgment in this case is absolutely impossible" principally because it had been decided in prior stages of this proceeding that the market price of gas during years subsequent to the period of interest here exceeded 3¢ per MCF; and the petitioners especially pleaded as res judicata the verdict of the jury on October 14th, 1937. The only evidence (if it may properly be called evidence) offered by petitioners on the trial of the rule was the affidavit of Mr. Gilbert P. Bullis, the attorney for petitioners, who without having had—in so far as the Record discloses—any experience in the gas

business itself, classified himself as an expert because of his having conducted ten trials on the issue of the market price of gas in the Richland Parish Field. This affidavit, **in so far as it purported to state facts,** related to certain pipe line contracts which were under the settled Louisiana jurisprudence inadmissible in evidence to prove the market price of gas in the Richland Field during the period prior to March 19th, 1930 because during that period there was an open market in which arms-length sales of gas at the well were made.

The district judge in a short opinion (**R. 86 to 88, incl.**) held that the evidence submitted shows that there was a market at the well and that the market price was 3¢ per MCF; and he held in effect that the affidavit of Mr. Bullis was not sufficient to raise a substantial issue of fact. He therefore sustained the motion for summary judgment and rejected petitioners' demands for additional royalty payments on gas produced during the period referred to.

The conclusion of the district judge as to the valueless character as evidence of the affidavit of the counsel for plaintiffs was concurred in by the Court of Appeals (**R. 104-110**), both courts holding that the affidavits in support of the motion conclusively showed that the market price of gas at the well during the period in question here did not exceed the price of 3¢ per MCF, which the respondent paid the petitioners. Both courts concurred in holding that the evidence offered in behalf of petitioners (the affidavit of their counsel) was in effect no evidence at all.

Certiorari was granted by this Court upon a petition in which the abuse of the power of the court to grant a summary judgment under Rule 56 of the Rules of Federal Procedure is asserted as one error and failure to conform to local law is named as the other.

SUMMARY OF ARGUMENT

1. The Supreme Court of the United States will consider on certiorari only those issues tendered by the petition for the writ.

Green County v. Thomas,
211 U. S. 598, 29 S. Ct. 168, 53 L. Ed. 343;
Alice State Bank v. Houston Pasture Company,
247 U. S. 240, 38 S. Ct. 496, 62 L. Ed. 1096;
Johnson v. Manhattan Railway Company,
289 U. S. 479, 53 S. Ct. 721, 77 L. Ed. 1331;
Helvering v. Taylor,
293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623,
Washington, Virginia & Maryland Coach Company v. National Labor Relations Board,
301 U. S. 142, 57 S. Ct. 648, 81 L. Ed. 965;
Crown Cork & Seal Company v. Ferdinand Gutmann Company,
304 U. S. 159, 58 S. Ct. 842, 82 L. Ed. 1265;
General Talking Pictures Corporation v. Western Electric Company,
304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273;
Rorick v. Devon Syndicate,
307 U. S. 299, 59 S. Ct. 877, 83 L. Ed. 1303;
Dickinson Industrial Site v. Cowan,
309 U. S. 382, 60 S. Ct. 595, 84 L. Ed. 819.

2. In so far as affidavits filed in opposition to a motion for summary judgment are founded on hearsay or contain evidence which would not be admissible if a trial were had or are made by a person not having personal knowledge of the facts or by a person not affirmatively shown to be competent to testify as to the matters to which the affidavit relates, they may not be considered by the court.

Rule 56 (e) Federal Rules of Civil Procedure.

3. Rule 56 of the Federal Rules of Civil Procedure is a means to the desirable end of determining in a particular case whether or not there is a substantial issue of fact; and its proper application does not unconstitutionally deprive the party against whom the summary judgment is rendered of the right to a jury trial.

Moore's Federal Practice Under the New Federal Rules, Volume 3, page 3174;
Fidelity & Deposit Company of Maryland v. United States of America to the Use of Lewis E. Smoot, 187 U. S. 315, 23 S. Ct. 120, 47 L. Ed. 194;
In the Matter of Walter Peterson, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919;
Port of Palm Beach District v. Goethals, 104 Fed. (2d) 706;
Rosenblum v. Dingfelder, 111 Fed. (2d) 406;
Heart of America Lumber Company v. Belove, 111 Fed. (2d) 535;
Banco De Espana v. Federal Reserve Bank, 114 Fed. (2d) 438;
Cohen v. Eleven West 42nd Street, Inc., 115 Fed. (2d) 531;
Bushwick Decatur Motors, Inc. v. Ford Motor Company, 116 Fed. (2d) 675;
Board of Public Instruction for County of Hernando, Florida v. Meredith, 119 Fed. (2d) 712;
Fletcher v. Krise, 120 Fed. (2d) 809;
Altman v. Curtis-Wright Corporation, 124 Fed. (2d) 177;
Battista v. Horton, Myers & Raymond, 128 Fed. (2d) 29;
Sedgwick v. National Savings & Trust Company, 130 Fed. (2d) 440;
Toebelman v. Missouri Kansas Pipe Line Company, 130 Fed. (2d) 1016;
Beall v. Pinckney, 132 Fed. (2d) 924;
Fishman v. Teter, 133 Fed. (2d) 222;
Piantadosi v. Loew's Inc., 137 Fed. (2d) 534;
Pen-Ken Oil & Gas Corporation v. Warfield Natural Gas Company, 137 Fed. (2d) 871;

4. The decision of both of the lower courts here is in full accord with the established jurisprudence of Louisiana.

Sartor vs Arkansas Natural Gas Corporation,
46 Fed. Sup. 111;
Sartor vs Arkansas Natural Gas Corporation,
134 Fed. (2d) 433;
Wall v. United Gas Public Service Company,
178 La. 907, 152 So. 561;
Sartor v. United Carbon Co.,
183 La. 287, 163 So. 103;
Sartor v. United Gas Public Service Company,
186 La. 555, 173 So. 103.

5. "Market Price" in Louisiana is the same thing as "market value". Both terms when applied to natural gas produced from Louisiana lands mean the market price generally paid at the well or in the field where the gas is produced.

Wall v. United Gas Public Service Company,
178 La. 907, 152 So. 561;
Sartor v. United Carbon Co.,
183 La. 287, 163 So. 103;
Sartor v. United Gas Public Service Company,
186 La. 555, 173 So. 103.

6. Where the existence during a particular period of time of an actual market at the well or in the field for natural gas produced from Louisiana lands is shown, evidence as to prices paid for gas under long term pipeline contracts with unusual and onerous obligations on the sellers is not admissible to show the market price or market value of the gas.

Wall v. United Gas Public Service Company,
178 La. 907, 152 So. 561;
Sartor v. United Carbon Co.,
183 La. 287, 163 So. 103;
Sartor v. United Gas Public Service Company,
186 La. 555, 173 So. 103.

ARGUMENT.

MAY IT PLEASE THE COURT:

Since one man cannot generally see into the mind of another, we have no way of knowing what induced this Court to consent to review the judgment of the Court of Appeals in this case; and we are, therefore, forced to assume that the issues tendered in the petition for certiorari and the brief supporting it are those in which this Court is interested.

This assumption is fortified by the prior jurisprudence of this Court to the effect that only those issues tendered by the petitioner for certiorari will be considered.

Green County v. Thomas,
211 U. S. 598, 29 S. Ct. 168, 53 L. Ed. 343;
Alice State Bank v. Houston Pasture Company,
247 U. S. 240, 38 S. Ct. 496, 62 L. Ed. 1096;
Johnson v. Manhattan Railway Company,
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Helvering v. Taylor,
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301 U. S. 142, 57 S. Ct. 648, 81 L. Ed. 965;
Crown Cork & Seal Company v. Ferdinand Gutmann Company,
304 U. S. 159, 58 S. Ct. 842, 82 L. Ed. 1265;
General Talking Pictures Corporation v. Western Electric Company,
304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273;
Rorick v. Devon Syndicate,
307 U. S. 299, 59 S. Ct. 877, 83 L. Ed. 1303;
Dickinson Industrial Site v. Cowan,
309 U. S. 382, 60 S. Ct. 595, 84 L. Ed. 819.

We come, therefore, immediately to consideration of the first assignment of error.

In the petition for certiorari the question raised with regard to the use of summary process is subdivided into six parts, which we quote.

"(1-a). May a District Court deprive a litigant of trial by jury, by granting summary judgment, when the evidence is conflicting, and summary judgment requires the determination of controverted facts and the weight, sufficiency and effect of evidence?

"(1-b). May the **opinions** of witnesses testifying by affidavit be used as a basis for summary judgment, or must the testimony be on facts only?

"(1-c). Is a litigant deprived of due process of law, when hostile witnesses testify to their opinions by affidavit, and the litigant is deprived by the practice in summary judgment, of the right to cross-examine these hostile witnesses as to their qualifications as experts, and the basis of their opinions.

"(1-d). When two juries have decided all the facts in a case in favor of plaintiff, in previous trials, may summary judgment be rendered in favor of defendant on the same facts?

"(1-e). The rule states that 'pleadings, depositions and admissions on file' shall be used on trial for summary judgment. Does this include documents filed in a previous trial of the same case?

"(1-f). May the affidavits of witnesses state the contents of written documents not in evidence?"

Of these parts, question (1-b) may be summarily disposed of by pointing out that the affidavits submitted in support of the motion for a summary judgment were the sworn statements of men who as the result of their long experience in the gas business, which experience included the making of innumerable sales, among them being sales of gas from the Richland Field itself, were informed in the highest degree regarding the market price of gas in that and other fields and who predicated their conclusions upon sales of gas from wells in the Richland Field in which they either participated or of which they had personal knowledge.

Likewise, (1-d) may be given short shrift by pointing out that of the two jury verdicts one was set aside by the

Court of Appeals and the other dealt only with the question of the market price of gas during a period subsequent to that involved here.

(1-e) is without bearing on the decision of this case. It doubtless refers to the refusal of the district court to include in the transcript of appeal condensation of certain pipe line contracts which had not been offered in evidence by either party on the trial of the motion for summary judgment. (See **Bill of Exceptions, R. 95 to 100.**) The district judge, however, permitted this condensation to be made a part of the Bill of Exceptions; and it was printed as a part of the Record. Both the district court and the Court of Appeals held that evidence as to the prices paid under these pipe line contracts was irrelevant and inadmissible because of the clear proof of the existence of a market at the well in the field and of a market price of not more than 3¢ per MCF in that market during the period beginning with the year 1927 and ending March 19th, 1930.

We do not know to what (1-f) is intended to relate; but it should suffice to point out that the affidavits of the witnesses for respondent were considered by both courts adequate to prove the facts of the existence of the market at the well in the field during the period referred to; and we take it that where the lower courts have concurred in a finding of fact, this Court will not undertake to review the evidence and determine if it would have made a similar finding on the same evidence.

This brings us to a discussion of parts (1-a) and (1-c), which are so closely related that they should be considered together.

Except for the legal and constitutional question as to the power of the district court to "deprive a litigant of trial by jury by granting summary judgment", part (1-a) is wholly inapplicable to the state of facts shown to exist in this case. There is no conflicting evidence; for all of the evidence which was relevant and material and competent is embraced in the affidavits supporting the motion for summary judgment.

Rule 56 of the Rules of Civil Procedure, which were prescribed for district courts by this Court and which this Court at the time at least doubtless considered it had the power to adopt, declares:

"Summary Judgment.

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

"(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further

proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

"(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"(g) Affidavit Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

It will be noted that paragraph (e) of the rule requires both supporting and opposing affidavits to be made from personal knowledge, to set forth such facts as would be admissible in evidence, and to show affirmatively that the affiant is competent to testify to the matters stated therein. The affidavits supporting the motion for summary

judgment meet these requirements in every particular; but tested by any one of these three requirements the affidavit of the learned counsel for the petitioners is found defective. It is not sufficient for a witness to say that he is competent to testify as to market price; it is essential that such competency should appear by proof of the source of his information. Here that source was the statements of witnesses made in prior trials. If there had been a trial of this case and counsel for petitioners had attempted to summarize the testimony on the point given by witnesses in prior trials, an objection to the hearsay character of the testimony must necessarily have been sustained. One does not become an expert or informed witness qualified to testify concerning sales of gas over a particular period by reason of trying lawsuits and hearing witnesses testify in relation to sales of gas.

Moreover, as said by the learned district judge in his opinion (**R. 87**):

> "Nothing was offered by the plaintiffs to dispute this proof except the affidavit of their counsel, which patently deals with the pipe line prices. Evidence as to pipe line prices, as has been held by both this court and the Court of Appeals, was admissible only if there was no market at the well, and it appearing from the showing made here without contradiction that there was such a price at the well, the necessity for considering the pipe line contracts or prices and the elements affecting them does not arise in this case."

In its opinion (**R. 109**) the Court of Appeals after declaring the established law in Louisiana, both in the state and federal courts, to be that where a market price at the well exists in a particular field, prices paid by pipe lines for gas delivered at points outside of the field are irrelevant, said in part:

> "The decisions, state and federal, standing thus, the defendant filed its motion in this cause for summary judgment. Averring in it that for the years in question remaining in the suit, there was a prevailing market price of 3 cents or less at the well and there

was, and could be, no genuine issue of fact to the contrary for trial to a jury, it supported the motion by numerous affidavits to that effect. Plaintiffs, insisting that in former trials of this case a jury had found for plaintiff a market value in excess of 3 cents, and arguing as they have consistently done, exactly contrary to the decisions of this and the state court, supra, that the pipe line contracts were evidence of, and determined, this market value to be more than 3 cents, offered neither affidavit nor proof of any kind rebutting the effect of the affidavits filed in support of defendant's motion that, as to the years in question in this suit, there was a market value at the well of 3 cents, and, therefore resort to proof of actual value was neither necessary nor proper. The district judge, holding, that under the law, as established by Federal and state decisions, evidence of pipe line prices was inadmissible if the evidence showed that there was a market price at the well, and that it appeared without contradiction that there was such a price, granted the motion for summary judgment and entered judgment accordingly. We think it clear that in so doing, he was right. We have written often on the nature and effect of Rule 56, the rule for summary judgment. Our views, as there expressed, leave in no doubt that the summary judgment rule is a salutary one for the purpose of avoiding unnecessary trials, that is, trials where there is nothing of fact to be tried. They leave in no doubt too that on such a motion it is the duty of counsel for plaintiff and defendant to fully disclose what the evidence will be on the issues raised by the motion, and of the district judge to proceed on the disclosures thus made. If on such disclosures, it appears that only one verdict could be rendered, that is, that there is no disputed issue of fact, it is then the duty of the judge to enter judgment in accordance with the showing made. It will serve no useful purpose to enter into an analysis of the supporting proofs offered by the movant. It is sufficient to say that they established without contradiction or question of any kind that in the early years of the field involved in this suit, there was a market price for the gas at the well, and that that market price was never at any time during any of the years in

question in excess of the 3 cents which defendant consistently paid plaintiffs. If, on a trial to a jury, the evidence would show this, it would be the duty of the judge to direct a verdict for defendant. It was his duty, therefore, on the motion for summary judgment to bring the matter to a close by entering judgment on the motion."

An excellent statement of the test of merit of an affdavit in support of a summary judgment is found in the opinion of the Court of Appeals for the Second Circuit in the case of **Banco De Espana v. Federal Reserve Bank, 114 Fed. (2d) 438 (445).**

"A bona fide affidavit to support a summary judgment must necessarily be a statement of the facts which the moving party knows and is able to substantiate at the trial.

"An affidavit of expert opinion has been held admissible only when made by an affiant with the necessary expert qualifications, Gloeser v. Moore, 284 Mich. 106, 278 N. W. 781; Baxter v. Szucs, 248 Mich. 672, 227 N. W. 666, and an affidavit containing inadmissible hearsay statements has been considered incompetent to the extent of the hearsay. Shea v. Leonis, 29 Cal. App. 2d 184, 84 P. 2d 277; Rosenthal v. Halsband, 51 R. I. 119, 152 A. 320. These rulings but serve to show that the courts look through the form to the substance of the matter presented, and that the real requirement is of proof which if presented at a formal trial would be competent to support the issues to which it is directed. When such proof is found in an affidavit presented in support of a motion for summary judgment, it should be considered even though the affidavit does not contain the then pointless offer of the affiant to submit to a cross-examination which will not be required if the affidavit is acceptable. Any other result would be as stultifying to this desirable summary procedure, as if we were to require the production of all witnesses at the hearing on the motion for the summary judgment as an earnest of their willingness to appear at a later trial."

(114 Fed. (2d) 445.)

We have not found a better statement of the function and history of the rule and the reasons for it than that of Professor James W. Moore in the scholarly work entitled **Moore's Federal Practice Under the New Federal Rules.** In **Volume 3, page 3174,** it is said:

"Function.

"The summary judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. In many cases there is no genuine issue of fact, although such an issue is raised by the formal pleadings. The purpose of Rule 56 is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense which may operate to defeat in whole or in part the recovery of a just claim. 'The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from which is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.' [1] To attain this end, the rule permits a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried. The court is authorized to examine evidence, not for the purpose of trying an issue, but to determine whether there is a genuine issue of fact proper for trial. If there is no genuine issue of fact in controversy, the parties are not entitled to a trial and the court, applying the law to the undisputed material facts may render a summary judgment. If there is a genuine issue as to a material fact, the case will go to trial. In this latter situation, however, Rule 56 (d) imposes a duty upon the court to sift the issues and to specify which material facts are really in issue and which are not, thereby facilitating and expediting the trial. This pre-trial sifting of the issues upon a motion for summary judgment, as provided in Rule 56 (d), is quite

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Note 1: Per Judge, later Justice, Cardozo in Richard v. Credit Suisse (1926) 242 N. Y. 346, 152 N. E. 110.

similar to the pre-trial procedure provided in Rule 16, except that under Rule 56 (d) it is compulsory, while under Rule 16 it is discretionary with the court.

"History.

"A species of the summary judgment procedures was adopted at an early date by at least one American colony, and after the separation from England, in a few of the states. While this early development of summary procedure in America is an interesting incident in American legal history, it was not of great significance and, in fact, the procedure disappeared with the adoption of the codes in the few states in which it had been in operation. The summary judgment procedure as we know it today was first adopted in England in 1855. It was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise to marry. The procedure was adopted in New York in 1921 for a limited class of actions, but was extended in 1933 to include so many classes of actions that it has been suggested that all restrictions be removed and that the remedy be available in any action. New Jersey, Connecticut, Wisconsin, Michigan, Illinois, California and a number of other states have also adopted some form of summary judgment procedure.

"The rule has operated successfully in all the jurisdictions in which it has been adopted and the tendency has been to enlarge the scope of its operation. The draftsmen of the Federal Rules took cognizance of this tendency to enlarge the scope of the summary judgment procedure. * * *

"Constitutionality; Right to Jury Trial; Summary Judgment in the Federal Courts.

"The Court of Appeals of New York has sustained the constitutionality of the summary judgment pro-

cedure, holding that it did not infringe the constitutional right of a party to a jury trial. [13] In disposing of the defendant's contention that he was deprived of his rights to a trial by jury, the court said:

"The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a bona fide issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment."

(pp. 3174, 3175, 3176, 3177, 3178.)

More than forty years ago this Court in the case of **Fidelity & Deposit Company of Maryland v. United States of America to the Use of Lewis E. Smoot, 187 U. S. 315, 23 S. Ct. 120, 47 L. Ed. 194,** sustained as against an attack on the ground that it unconstitutionally deprived the petitioner of the right to trial by jury a rule of the Supreme Court of the District of Columbia which in substance was a rule for summary judgment much the same as is being here considered. Mr. Justice McKenna was the organ of the Court; and in the course of his opinion said:

"There is but one element in this contention,—the right of a jury trial. In passing upon it we do not think it necessary to follow the details of counsel's elaborate argument. In Smoot v. Rittenhouse (27 Wash. L. Rep. 741) the validity of the rule was sustained, as well as the power of the court to make it. If it were true that the rule deprived the plaintiff

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Note 13: General Investment Co. v. Interborough Rapid Transit Co. (1923) 235 N. Y. 133; 139 N. E. 216.

in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

"Certainly a salutary purpose, and hardly less essential to justice than the ultimate means of trial. And the case at bar illustrates this. It certainly does not seem unreasonable to charge one who has become responsible for the performance of an act by another with knowledge of that act or with means of ascertaining it, so as to state a defense within the liable interpretation of the rule declared by the court of appeals.

"As early as 1879 the supreme court of the District recited the history of the rule, and explained its purpose. 'It is a rule,' the court said, 'to prevent vexatious delays in the maturing of a judgment where there is no defense.'"

(47 L. Ed. 197, 198.)

Eighteen years later in the case entitled **In the Matter of Walter Peterson, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919,** this Court through Mr. Justice Brandeis more or less laid the foundation for the present Rule 56 by sustaining an order of the Honorable Augustus N. Hand, Judge of the District Court for the Southern District of New York,

"Upon motion of defendant, and against the objection of plaintiff, Judge Hand appointed an auditor (254 Fed. 625):

"With instructions 'to make a preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties, and make and file a report in the office of the clerk of this court with a view to simplifying the issues for the jury; but not finally to determine any of the issues in the action, the final determination of all issues of fact to be made by the jury on the trial; and the auditor to have power to

compel the attendance of, and administer the oaths to witnesses; the expense of the auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the trial judge.'

"The auditor was further ordered to report on certain facts under ten classifications. The design of this was largely to separate items in dispute from those as to which there was no real dispute, and, also, to set forth the detailed facts on which the specific claims made were rested; but the auditor was also thereby required to express his opinion on disputed issues, thus:

"'The various penalties, commissions, cash discounts, and other deductions which defendant claims to be entitled to deduct from the invoice price of the various shipments, the items thereof which are admitted by plaintiff as proper deductions, and the items in dispute, with his opinion as to each of such disputed items.

"'His opinion as to the net amount due on each invoice of coal sold and delivered to defendant.'"

(64 L. Ed. 921, 922.)

In the cited case as here, it was contended that the power granted to the auditor to resolve questions of fact and to give his opinion thereon violated the constitutional right of trial by jury; but the contention was summarily rejected.

"The command of the 7th Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained. Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768. Compare Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new

rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."

(67 L. Ed. 923, 924.)

The extent to which the rule was needed for the facilitation of judicial procedure is shown by the instant favor with which it has been received by the lower federal courts and the large number of cases in which its use has been approved by the courts of appeals of practically every circuit. The district court decisions of this character are too numerous even for a selection to be made; but among the scores of Court of Appeals decisions the practical application of the rule is well illustrated by

Port of Palm Beach District v. Goethals,
104 Fed. (2d) 706;
Rosenblum v. Dingfelder,
111 Fed. (2d) 406;
Heart of America Lumber Company v. Belove,
111 Fed. (2d) 535;
Banco De Espana v. Federal Reserve Bank,
114 Fed. (2d) 438;
Cohen v. Eleven West 42nd Street, Inc.,
115 Fed. (2d) 531;
Bushwick-Decatur Motors, Inc. v. Ford Motor Company,
116 Fed. (2d) 675;
Board of Public Instruction for County of Hernando, Florida v. Meredith,
119 Fed. (2d) 712;
Fletcher v. Krise,
120 Fed. (2d) 809;
Altman v. Curtis-Wright Corporation,
124 Fed. (2d) 177;
Battista v. Horton, Myers & Raymond,
128 Fed. (2d) 29;

Sedgwick v. National Savings & Trust Company,
130 Fed. (2d) 440;
Toebelman v. Missouri-Kansas Pipe Line Company,
130 Fed. (2d) 1016;
Beall v. Pinckney,
132 Fed. (2d) 924;
Fishman v. Teter,
133 Fed. (2d) 222;
Piantadosi v. Loew's, Inc.,
137 Fed. (2d) 534;
Pen-Ken Oil & Gas Corporation v. Warfield Natural Gas Company,
137 Fed. (2d) 871;

In **Cohen v. Eleven West 42nd Street, Inc., supra,** appears a brief statement of the working of the rule which is more or less typical of what the federal courts have generally held.

> "A motion for summary judgment is not a trial; on the contrary it assumes that scrutiny of the facts will disclose that the 'issues presented by the pleadings' need not be tried because they are so patently insubstantial as not to be genuine issues at all. Consequently, as soon as it appears upon such a motion that there is really something to 'try', the judge must at once deny it and let the cause take its course in the usual way. We do not therefore see any greater inconsistency between a trial and a motion for summary judgment in bankruptcy than in an ordinary action. No doubt, a judge must often come near to trying the issues before he can decide whether there are any issues to try, but that is inherent in the whole practice. * * *
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> "Nevertheless, when the statute, § 131, prescribed what facts a petition must allege, it did not mean that the petitioners should be entitled to interlocutory remedies under color of a sham petition. It is as unwarranted an invasion of the debtor's rights to subject it to inquisition upon such a petition, as it is so to subject a defendant in an action. Rule 56 was

intended to give an immediate relief for such wrongs, wherever practiced."

(115 Fed. (2d) 532.)

Applying these principles to the facts in this case, it seems apparent that the judgment of Judge Dawkins on the motion for summary judgment did not deprive the petitioners here of the right to a trial by jury of any issue of fact which the judge would have been required to submit to the jury if there had been a trial. The proof tendered in support of the motion overwhelmingly established the lack of any substantial issue of fact and showed that the respondent was entitled to a summary judgment; and the only contrary proof was an affidavit by the counsel for petitioners, who professed to have become an expert on prices received for gas by those who sold gas in the Richland Field over a period of years because of what he has heard the witnesses say in the course of ten cases involving that issue which were brought and tried by him. As said by Judge Dawkins of a similar affidavit which was filed by the same counsel in the case of Hemler v. Union Producing Company, 40 Fed. Sup. 824 (827):

> "He has offered no sworn opinions by anyone familiar with prices in the Richland Field, such as those tendered by defendant, except that of his counsel, who gained his opinion not by producing or dealing, but by handling lawsuits, and it is evident that this opinion is based upon pipe line contracts and prices which were disclosed at the trial of the first Pardue case and in subsequent trials."

We submit that the first assignment of error of petitioners with its various ramifications is without merit.

The second contention that petitioners make is that the decision of the district court and of the Court of Appeals in this case is contrary to the jurisprudence of Louisiana.

We submit that exactly the reverse of this is true and that the law of Louisiana as interpreted by at least three decisions of its Supreme Court is exactly in accord with the decisions of the district court and the Court of Appeals here.

Under the terms of the lease the petitioners were to be paid for the royalty gas on the basis of "market price." "Market price" in Louisiana means the price which is paid at the well in the field for the oil or gas or other commodity and not the price which it might command at some point outside of the field, no matter how near to the field that point might be. It is not the intrinsic value of the product but what it customarily sells for in the open market at the well in the field where it is produced and where it first comes into the possession of the operator and his lessor. Neither the district court nor the Court of Appeals held, as suggested on page 3 of the petition for the writ of certiorari in this case, that this market price is to be determined by the opinion of experts instead of by sales in the field; on the contrary it was the conclusive proof as to the sales made in the field during the period with which we are here concerned that was responsible for the approval by the Court of Appeals of the summary judgment of the district court.

This is sharply brought home by a comparison of the opinion of the Court of Appeals in this case with its opinion in the companion case of **Hemler v. Union Producing Company, 134 Fed. (2d) 436,** in which the question was as to the market price of gas in the Richland Field for the period beginning with the year 1929 and running through the year 1939. The court held in the Hemler case that the lower court was right in granting the motion for a summary judgment as to the claim for additional royalties on gas produced up to March 20th, 1930 because the evidence showed that there was an actual market at the well in the field and actual sales made at the well in the field at the price established in that market during that period of time; but as to subsequent years the court held that the market in the field had substantially ceased to exist and that the evidence did not establish with the same conclusiveness that there were sales in the field during this subsequent period so as to meet the test of the Louisiana jurisprudence for the establishment of an actual market.

During the first few years of the existence of the Richland Field, as in most other gas fields, many gas producing properties were owned by independent operators—men who acquired leases, drilled wells, produced gas and sold

the gas either to pipe line companies or carbon black companies or other buyers. These independent operators are a restless lot and in practically every case after the flush production is gone they cash in their profits by selling their properties to people who are buying gas from them and turn to other fields. It is then that a market in the field, in the sense in which the Louisiana courts use the term, ceases to exist. Even a slight familiarity with the decisions of the Supreme Court of Louisiana on the point is sufficient for the conviction that the rule adopted here by the district court and by the Court of Appeals is the same as that which prevails in the state courts of Louisiana.

In **Wall v. United Gas Public Service Company, 178 La. 907, 152 So. 561,** the question of the meaning of "market price" as used in an oil and gas lease with relation to the manner in which the lessor should be paid his royalty was squarely presented to the Supreme Court of Louisiana. The decision speaks for itself and we quote the following pertinent portions of it.

> "As to gas, it is provided that the lessees shall pay to the lessor $200 each year for each well producing gas only, until such time as the gas shall be utilized or sold off the premises and that thereafter 'the grantor shall be paid one-eighth (1/8) of the value of such gas calculated at the market price per thousand feet, corrected to two pounds above atmospheric pressure.'
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> "The district court * * * held that plaintiffs should be paid on the basis of the price received for the gas where sold, less the expense of conveying it to the market. According to the findings of the trial judge, plaintiffs should have been paid slightly more than 4 cents per thousand cubic feet for the gas.
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> In the lease contract here involved, the lessee was required to pay to the lessor one-eighth of the value of the gas sold off the premises, calculated at the 'market price' thereof. The price to be paid was left open or made to depend upon the 'market price' at the time the gas was produced. The lessee settled with the lessors for the gas at 4 cents per thousand

cubic feet, which it contends was the 'market price' at the well, its theory being that the market price there is the proper basis for the settlement. It admits that it sold the gas at a place two miles from the field at 5.8 cents per thousand cubic feet. The plaintiffs demand settlement on the basis of the sale price of the gas where sold.

"There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether the term 'market price' meant the price at the well or the price the gas would bring in a market remote from the well. We think it reasonable to assume that the parties intended that, if there was a market for gas in the field, the current market price there should be paid. There is where the gas was reduced to possession and there is where ownership of it sprang into existence. The result of bringing the gas to the surface of the ground in the field was to reduce to ownership there a commercial commodity. Previous to the moment the gas reached the surface of the ground, the parties owned nothing so far as the gas was concerned, except the right to explore for it and reduce it to possession and ownership.

* * * *

"The reason why the division and delivery is made at the well, in cases where there is to be a division in kind, is that there is where the parties come into ownership of the commodity, there is where title vests. The lessor and lessee are vested with title to the gas at the well or in the field in the same proportion as the oil is owned. And while there is to be no division of the gas in kind, it is nevertheless contemplated that there shall be a 'division', not of the gas in kind but of its value as fixed by the market price.

"Now if the division in kind, where such is contemplated, should be made at the place where ownership vests, it follows that the division of the value or proceeds of the gas should be made there, provided, of course, that the value of the gas can be determined, and that depends upon whether there is a 'market price' for it in the field.

"The term 'market price' does not mean an arbitrary price fixed by the lessee. 'Market price' means, according to Webster, 'the price actually given in current market dealings.'

* * * *

"As to the price which the lessee was required to pay the lessor as a basis of settlement, the contract here involved stipulates that he should pay one-eighth of the 'value of such gas' calculated at the 'market price', which means the market price at the well or in the field and not the price which it would bring in a distant market.

* * * *

"In the case of Scott v. Steinberger, 113 Kan. 67, 213 P. 646, 647, the Supreme Court of Kansas held that under an oil and gas lease similar to the one in the present case, the contract should be construed to mean that the gas produced 'should be measured and the price determined at the place where the wells were connected with pipe lines, and not at some distant market that might be found at the end of a pipe line remote from the field and where the cost of transportation might equal or exceed the value of the gas produced.' A similar view was expressed by the Kentucky Court of Appeal in the case of Rains v. Oil Company, 200 Ky, 480, 255 S. W. 121.

"To hold that the lessors in this case should receive in settlement one-eighth (or one-sixteenth as they own only one half of the mineral rights) of the gross price received by defendants for the gas, would, in effect, be to hold that it was the duty of the lessees to bear all the expense of carrying the gas to a market beyond the gas field. This would be directly contrary to our holding in the case of Coyle v. La. Gas & Fuel Co., 175 La. 990, 144 So. 737, which case was reaffirmed in Crichton et al. v. Standard Oil Co., 178 La. 57, 150 So. 668 (decided July 7, 1933, and not yet reported)."

(178 La. 910, 911, 912, 913, 914, 915, 916, 917.)

With regard to the ruling of the district judge that the market price should be determined by taking the pipe line price and deducting therefrom the expense of piping the gas to the place where it was delivered, the court said:

"His ruling would unquestionably be correct if as a matter of fact the gas had no 'market value' in the field. But we find as a fact that it did. The testimony shows that there are several gas fields in the northern section of the state, East Texas, and South Arkansas, among them being the Rodessa, Sugar Creek, Cotton Valley, Elm Grove, Shongaloo, Greenwood or Waskom, Richland, and Ouachita-Morehouse.

"It shows further that natural gas has a market value in each of the fields; that pipe lines have been built into each of them; and that the companies purchase gas in each of them at competitive prices. The testimony shows further that 4 cents per thousand cubic feet is the average price paid in these fields and that the price paid plaintiffs was based on that average. In the Elm Grove, Richland, and Ouachita-Morehouse fields, the price is 3 cents, but in some of the others it is 4 cents, and in one it is 5 cents. Therefore the price of 4 cents paid by defendant in this case was not an 'arbitrary price' as suggested by counsel for plaintiffs, but the average price paid in the North Louisiana territory. That is the 'market price' in the fields and must be accepted as the basis of settlement in this case."

(178 La. 918.)

The same question was presented in the case of **Sartor v. United Carbon Company, 183 La. 287, 163 So. 103,** in which the petitioners here were the plaintiffs and were represented by the same counsel. In the cited case suit was filed as here to recover the difference between a royalty paid and what the petitioners claimed should have been paid. The district judge sustained an exception of no cause of action, and the Supreme Court affirmed the action for the following reasons:

"It is conceded that the lessors, under the provisions of the leases which are annexed to and made a part of the petition, were entitled to be paid the royalty of one-eighth of the value of the gas calculated on the market price at the well. The petition alleges that plaintiffs are entitled to the market price at points nearest to the well in Richland parish,

because there were no sales at the well. The petition does not state that there were no sales or market for the gas at the field in question.

"This court, in the case of Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561, held that the language in the lease which required the royalty to be paid on the basis of the market price at well was synonymous with the market price at the field where the gas was produced.

* * * *

"Plaintiffs under the allegations of the petition and terms of the leases may be entitled to the difference between what was paid them and the market price at the well or field where the gas was produced, if such sums be due; but they are not entitled to the general market price of the gas in Richland parish. Harris v. United Gas Public Service Co., 181 La. 983, 160 So. 785. Therefore, the court properly sustained the exception as to the first item."

(183 La. 289, 290.)

The next case and the one in which the issues are substantially identical with those here presented is another suit brought by these same petitioners in the Louisiana court: **Sartor v. United Gas Public Service Company, 186 La. 555, 173 So. 103,** in which it was sought to recover additional gas royalties under a gas royalty clause which, like the one in the present case, provided for the payment of one-eighth of the value of the gas and not less than 3¢ per MCF. The pipe line contracts which were the basis of the averments and arguments set forth in the affidavit of petitioners' counsel filed in response to the motion for summary judgment were all in evidence in the cited case and their contents are recounted at length by the court in its option. The whole decision of the Louisiana Supreme Court in the cited case is so pertinent to the issues here presented that we feel justified in quoting from it at some length.

"Under the mineral lease granted by plaintiffs, they were to be paid as royalty one-eighth of the market value of the gas extracted from their land. Three cents per thousand cubic feet was stipulated as

the minimum value of the gas, but no maximum value was fixed, and it is conceded by defendant that plaintiffs were entitled to royalty payments based upon the market value.

"Where there is no stipulation to the contrary in a lease contract of this kind, 'market value' is understood to mean the current market price paid for gas at the well or in the field where it is produced. Wall v. United Gas Public Service Company, 178 La. 908, 152 So. 561; Sartor v. United Carbon Company, 183 La. 287, 163 So. 103, 104.

"Plaintiffs' land is in what is known as the 'Richland field', and in order to prove the 'market value' of natural gas in that field they filed in evidence eight documents marked for identification as P-5 to P-13, inclusive. These documents are contracts entered into by large corporations engaged in the business of producing and selling natural gas in the various gas fields of North Louisiana, with pipe-line companies, which are engaged in the transportation to and sale of gas at the town borders of various towns and cities in several states. They all relate to the sale of gas produced in the Richland and Ouachita fields and show the prices paid to producers by the pipe-line companies.

"Plaintiffs offer no other testimony to sustain their allegations that the market value of gas in the Richland field exceeds 3 cents, the price they were paid by the defendant. These contracts, except Exhibits 6 and 7, show that the minimum price at which the producers agreed to sell gas to the pipe-line companies during the years 1930, 1931, and 1932 exceeded 3 cents. In each of the contracts except two, the prices agreed upon ranged from 4½ cents for the first three years, to 8½ cents for the last years of the periods over which the contracts run; these periods being ten years in some and fifteen years in other cases.

"These contracts show that the pipe lines owned by the purchasers of the gas extended into the fields where the gas is produced and that the producers obligated themselves to deliver the gas into the pipe lines at one specified point in each of the gas fields.

"It is argued on behalf of the plaintiffs that the prices received by the producers from the pipe-line companies should be accepted as the 'market value' of the gas in the field, as that term is used in the lease contract. The trial judge was not impressed with this argument. Neither are we.

"The testimony shows that there are two large gas fields in North Louisiana, one known as the 'Richland field' and the other as the 'Ouachita field.' The Richland field comprises an area within the parish of Richland, where the record shows that innumerable oil and gas leases have been granted by landowners. This field has been extensively developed and is, or was at one time, one of the greatest gas-producing areas in the South. Just how many gas-producing wells there are in this field is not shown. The Ouachita field is much larger in area, comprising parts of the parishes of Ouachita, Morehouse, and Union. This field is also highly developed, there being therein literally hundreds of producing wells.

"These two fields, comprising parts of the four parishes, Richland, Ouachita, Morehouse, and Union, all grouped together in the extreme northern portion of this state, taken together embrace within their limits territory which is said to be one of the largest, if not the largest, natural gas-producing areas of the entire country. For several years there has been produced and is yet being produced in these fields vastly more natural gas than can be disposed of and consumed in local markets, the result being that a market for the gas has been sought in regions far beyond the borders of this state. There is testimony in the record showing that gas from these fields is piped as far north as St. Louis and as far east as Atlanta. Millions of dollars have been spent in the construction of pipe lines to convey the gas to foreign markets. The corporations which built these pipe lines make contracts for the sale of gas to consumers in the territory adjacent to and at the ends of the lines, and in order to comply with their contracts, they in turn contract with producers to furnish the gas delivered into their pipe lines. The contracts between the producers and the pipe-line companies

run over periods of ten to fifteen years, the producers being obligated to furnish such amounts of gas as the pipe-line companies may demand, usually within minimum and maximum limits.

"In order to supply the gas, the producers must maintain, at enormous expense what are known as 'gathering systems', which involve every expense from the purchasing of the leases to the laying of the lines to convey the gas from the wells to the pipe lines, the cost of meters to be installed at the pipe lines where the gas is delivered, the expense of their installation, the cost of keeping a clerical force to read the meters, calculate the amount of gas delivered, keep books, and make monthly reports to the purchasers.

"We have read all the contracts introduced and find that as relates to the obligations assumed by the producers, they are almost identical, about the only difference being as to the minimum and maximum amounts of gas to be delivered. In sum, here is what the producers obligated themselves to do:

"First, to deliver a specified 'annual minimum' amount of gas to the buyer and be prepared to deliver up to twice this amount upon the demand of the buyer. The annual minimum is subject to upward revisions as specified in the contract, the buyer being at all times entitled to demand a maximum amounting to twice the agreed minimum.

"Second, if deliveries for any reason fall below the amount agreed upon, the producer has a specified number of days in which to take steps to correct the deficiency and a specified number of days in which to resume delivery of the full amount. If the deficiency remain uncorrected after the specified number of days, the buyer is not obligated to take the full amount contracted for; and at the expiration of two years, the deficiency persisting, the buyer may cancel the contract.

"Third, to deliver all gas to two receiving stations, one in the Ouachita field and one in the Richland field. The producer or seller must provide and maintain

meters, pressure gauges, and other equipment for measuring and recording the amount of gas delivered, and keep accounts and render monthly statements to the buyer.

"Fourth, seller must warrant title to all gas it delivers and must indemnify the buyer in case of judgments arising out of title or royalty litigation. It must pay production and severance taxes.

"By thus binding themselves under these contracts, the producers or vendors of the gas take all the risks and assume heavy burdens. They are required to make contracts extending over long periods of time, which involve the hazard or gamble that the wells and the territory then producing gas will continue to produce until the end of the term, which the testimony shows is always uncertain. If the wells for any reason cease to produce, and many wells do, according to the testimony, the producers must drill others. They are required by the pipe-line companies, the purchasers, to deliver during each year a minimum amount of gas, and at the option of the purchasers, double that amount. The producers have no way of knowing what amount of gas the purchasers will demand above the minimum stipulated in the contract, and for that reason it is necessary for them to stand ready at all times to deliver not only the minimum, but the maximum if called upon to do so.

"There is a wide range or margin between the minimum and the maximum amounts stated in the contracts. So that the producers, in order to be able during the life of the contracts to comply with their obligations to supply the maximum if the demand is made upon them, are compelled, in effect, to hold in reserve vast quantities of gas which may never be demanded. By that we mean that it is necessary for the producers to be prepared to deliver, not only the amount of gas which the purchasers are required under the contracts to take, but such additional amount up to the maximum as the purchasers may at their option demand. They must make preparations to deliver gas which may never be called for.

"The drastic 'stand-by' requirement in these contracts adds greatly to the expense of carrying them out. The testimony shows that the guaranty on the part of the producers to deliver, on demand, large quantities of gas above the minimum, formed part of the consideration for the prices paid by the pipe-line companies.

"We have said that the pipe lines extended into the Richland field. By that we do not mean that they were laid up to or even near to each of the wells in the field. The so-called 'field' extends over a wide area with wells in every part of it. The pipe lines extend to a point in or near each of the fields where there are installed receiving or delivery stations. The purchasers pay for no gas except that which is delivered.

"These plaintiffs assumed no responsibility, guaranteed nothing, took no risks, and shared none of the expense of gathering and delivering the gas to the purchasers.

"Plaintiffs' theory that these pipe-line prices should be accepted as the basis for settlement with them is unsound. Under their contract they are entitled to payment for their royalty interest in the gas based upon the 'market value' at the place where it is reduced to possession and ownership, where title vests, which is at the well, not at some distant point in the 'field' or elsewhere, to which it is transported for sale and delivery to the pipe lines. This was made clear in the case of Wall v. United Gas Public Service Company, supra.

* * * *

"In the case presently under consideration, the testimony shows that natural gas has a 'market value' at the wells of 3 cents per thousand cubic feet. The defendant called numerous witnesses, all engaged in the business of producing and selling natural gas in the Ouachita and Richland fields. These witnesses without exception testified that the market value of gas at the wells in the field was 3 cents. In addition, defendant offered in evidence numerous contracts

showing the sale of gas in the field at 3 cents. Innumerable lease contracts (said to be about 900; we did not count them) were introduced in evidence, practically all of them showing that the lessors were to be paid royalties based upon the value of the gas at 3 cents per thousand cubic feet.

"A detailed review of the testimony introduced by defendant to show the market value of the gas at the wells in these fields would serve no useful purpose. It suffices to say that defendant proved conclusively that the market price in these fields does not exceed 3 cents per thousand cubic feet.

"As we have already stated, plaintiff offered no testimony as to the value of gas except that stipulated in the so-called pipe-line contracts. Having rejected the theory that the prices stated in these contracts should be accepted as a basis for settlements with these royalty owners, we must rely upon the testimony introduced by defendant to show the market value of gas at the wells or in the fields where it is produced."

(186 La. 559 to 569, incl.)

These decisions clearly show the perfect agreement between the Louisiana Supreme Court and the United States Circuit Court of Appeals for the Fifth Circuit in regard to what is the meaning of the words "market price" or "market value" or "value" in an oil and gas lease such as that upon which the claim of the petitioners here is based.

CONCLUSION

It is respectfully submitted

that the evidence supporting the motion for summary judgment showed positively and definitely and beyond reasonable doubt that there was during the period with which this case is concerned a market for gas at the well in the Richland Field and that the price uniformly paid for gas in that market was 3¢ per MCF;

that the only opposing evidence offered by petitioners was the affidavit of their counsel, which showed

that he was not competent to testify as an expert and disclosed his testimony, as embodied in the affidavit, either to be not based on his personal knowledge (and therefore hearsay and inadmissible) or to relate to prices paid for gas under long term pipe line contracts which were themselves for reasons heretofore stated inadmissible;

that Rule 56 of the Federal Rules of Civil Procedure is a salutary and constitutional means for summarily disposing of cases where the issues of fact tendered by the pleadings are either insubstantial or fictitious and that the present suit is exactly the kind of case to which the rule was intended to apply.

From this it follows that the judgment of the district court and the Court of Appeals was correct and should be affirmed.

Respectfully submitted.

HENRY C. WALKER, JR.
LEON O'QUIN
ARTHUR O'QUIN
ELIAS GOLDSTEIN,

Attorneys for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1943

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vs.

ARKANSAS NATURAL GAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FIRST SUPPLEMENTAL BRIEF FOR RESPONDENT

H. C. WALKER, JR.,
LEON O'QUIN
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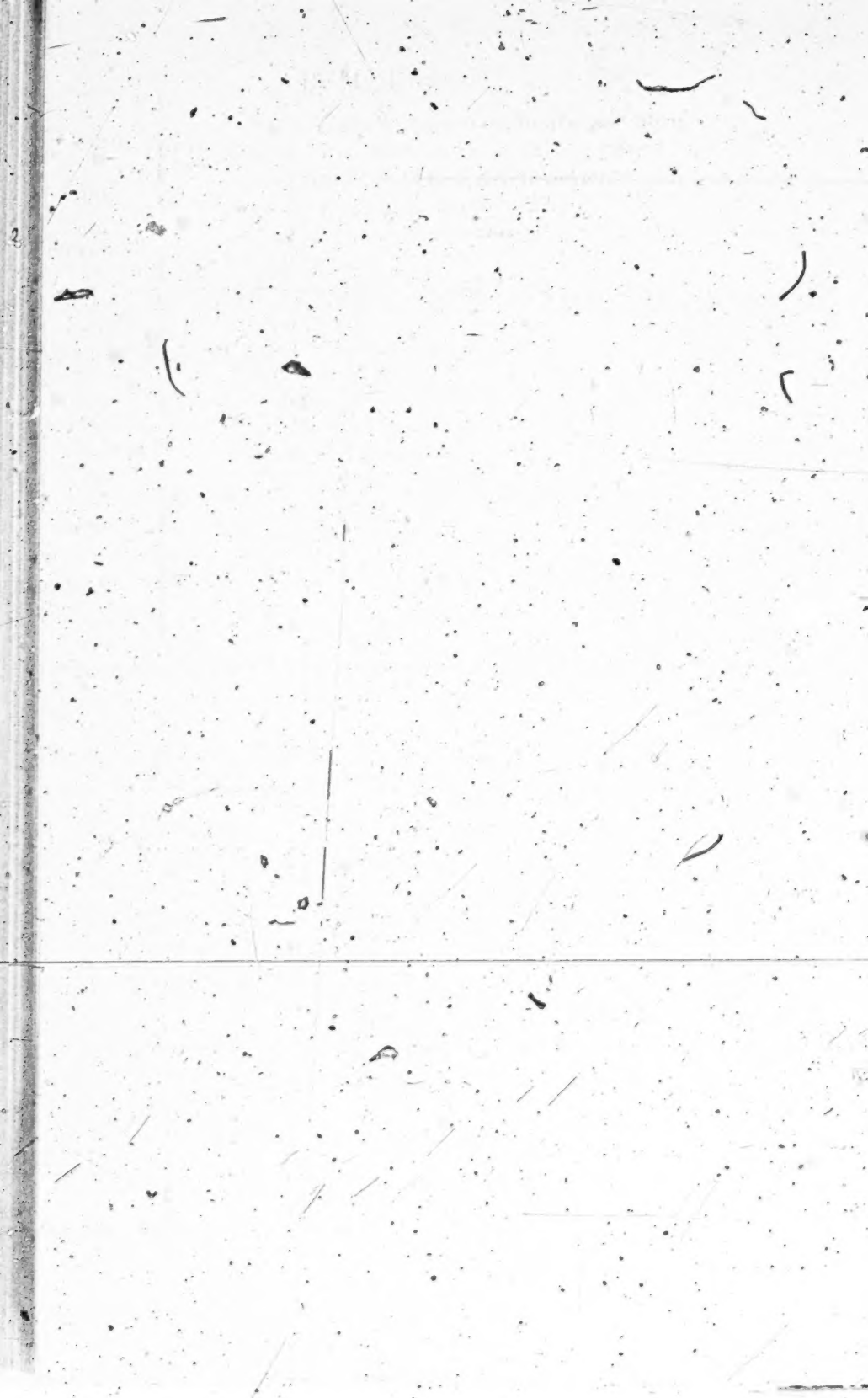

MAY IT PLEASE THE COURT:

So much interest was shown by the Court during the argument of this case in the matter of what evidence other than opinion evidence there is in the Record to support the judgment of the lower courts and in regard to the probative value (or lack of probative value) of the affidavit of the attorney for petitioners that we have concluded to file a short supplementary brief directing special attention to those parts of the Record which are relevant to these questions.

(1) The affidavit of Mr. R. H. Hargrove (**R. 53**) after stating his conclusion that the market price of gas at the well in the Richland Field during the period of interest here was 3¢ per MCF, bases it upon: (a) Various sales of gas by independent well owners at 3¢ or less. Mr. Hargrove names among these independent well owners T. L. James, Ruston Drilling Company, Richland Operating Company, Franklin Oil & Gas Company, W. C. Feazel, Sam D. Hunter, and Pelican Gas Company. (b) The sales of the lessors' royalty gas under ninety per cent of the leases in the field at 3¢ per MCF. Among these lessors was the State of Louisiana, the Department of Conservation of which is the repository of more information concerning oil and gas production and prices in Louisiana than is obtainable from any other source; and Mr. Hargrove states (**R. 54**) that "The State of Louisiana was among the lessors who received and accepted as correct royalty settlements for gas produced on the basis of 3¢ per MCF. (c) A substantial portion of the gas produced in the Richland Field was sold to carbon black plants and in almost every case the return to the seller was less than 3¢ per MCF. (d) "The Monroe gas field was brought in long before the Richland field, and is of much larger extent and importance, and in that field, there was established and generally recognized a price of 3¢ per

MCF for gas at the well. Much of the gas from the Monroe and Richland fields moved to a common market, and the ability of operators in the Richland field to supplement their gas supply from the Monroe field was one of the principal features in obtaining a satisfactory price for the Richland gas."

(2) The affidavit of Mr. E. N. Florsheim (**R. 60**) is to the effect that the Monroe field was in operation for ten years before the discovery of the Richland field and that there was a well recognized and established price of 3¢ per MCF for gas in the Monroe field which was the starting price for gas in the Richland field. Mr. Florsheim refers specifically to two sales made by him and his associates, one under the name of Richland Operating Company on July 27th, 1929 for twenty million cubic feet of gas per day at 3¢ per MCF for the first six months and thereafter based on the price of carbon black, which resulted in their subsequently receiving 1½¢ per MCF for gas thereafter delivered; and the other being the sale in the name of Franklin Oil & Gas Company to International Gas Products Company made on March 3rd, 1930 at 2½¢ per MCF. These were large contracts and deliveries were at the well in the Richland field.

(3) Mr. W. C. Feazel deposed (**R. 63**) that he had been in the oil and gas business, buying and selling leases and oil and gas lands, drilling wells and producing and selling oil and gas in different fields for twenty-five years and had been operating in the Monroe gas field for a number of years when the Richland field was brought in. He confirms Mr. Hargrove and Mr. Florsheim as to the established and recognized price in the Monroe field of 3¢ per MCF for gas at the well, and he reports sales made by him at 2½¢ per MCF from the Richland field with large deliveries of gas thereunder. He testifies (**R. 63**) as to the open market maintained by the United Gas Public Service Company for gas in the Richland field at the rate of 3¢ per

MCF on the basis of pro rata acreage production and states (**R. 64**) that at a time when he had a large quantity of gas available and could have sold it at 3¢ at the well, instead he sold his leases and wells because he had an advantageous offer for them. He further says that he was never offered more than 3¢ by anyone for his gas delivered at the well in the Richland Field.

(4) Sam D. Hunter, who is one of the wealthiest independent operators in the business, says in his affidavit that he has been in the business since 1916 and that he owned considerable acreage and drilled a number of wells in both the Monroe and Richland fields until he disposed of most of his properties in 1930. He details one sale made by him of a large amount of gas at 3¢ per MCF and stated that he had operated several smaller properties in the Richland field and that the prevailing market price for gas at the well in that field was 3¢.

This proof of actual sales at the well in the Richland field and of the maintenance of an open market at the well during the period of interest here in which gas was freely bought and sold at 3¢ per MCF is, independent of any opinion given by the well informed experts who made these affidavits, sufficient to establish a wellside price of 3¢ per MCF unless met by competent and admissible proof to the contrary.

We then have our second question: Is there such proof?

The affidavits of Mr. Gilbert P. Bullis, the attorney for the petitioners, (**R. 42, R. 81**) are substantially a repetition of the statements in the answer, which was likewise verified by Mr. Bullis (**R. 33**). Although in his affidavits Mr. Bullis states that he has personally read and examined all of the contracts of gas sales in the field, it is evident from the affidavits as a whole and from specific recitals in the affidavits that he is referring to the so-called pipe line contracts as being all of the sales of gas from the field; in

fact, he says in his affidavits (**R. 44, R. 83**) that all of the sales of gas produced in the Richland field are eight sales which he names, all of which were either the so-called pipe line sales or sales which were made at 3¢ per MCF or less. It is reasonable to conclude that if after thoroughly familiarizing himself with what he considered to be all of the contracts for the sale of gas during the period with which we are here concerned he names certain contracts as being all, these are the only contracts with which he is familiar. There are more than that many written contracts either filed in evidence or stipulated; and these are in addition to contracts not shown to be written which are testified to as heretofore shown.

SEE:

Defendent's Exhibit 3, R. 52;
Defendent's Exhibit 12, R. 68;
Defendent's Exhibit 13, R. 68;
Contract No. 1, R. 69;
Contract No. 2, R. 72;
Contract No. 3, R. 72;
Contract No. 4, R. 73;
Contract No. 5, R. 74;
Contract No. 6, R. 75;
Contract No. 13, R. 76, referred to in the affidavit of S. D. Hunter;
Contract No. 14, R. 76, referred to in the affidavit of E. N. Florsheim;
Contract No. 15, R. 77, referred to in the affidavit of W. C. Feazel;
Contract No. 16, R. 77, (may be one of those referred to in the affidavit of E. N. Florsheim).

If an attorney as a result of trying cases which deal with the price of gas is to be classified as an expert in oil and gas so that his ipse dixit in affidavit form is to be regarded as evidence sufficient to raise an issue of fact which cannot be resolved on a motion for summary judgment, we

venture to say that it will prove impracticable in most cases to resort to the summary judgment proceeding, as most attorneys have tried cases involving to some extent the same questions which are presented in the particular case in which the motion may be made. Every patent attorney will be in position to qualify as an expert and to prevent summary judgment being rendered in a patent suit by saying that the statements made by experts in their affidavits are untrue and that he as an expert does not agree with them. The lawyer in a workman's compensation case who has handled many cases involving injuries of the same character as those which form the basis of a suit may prevent a summary judgment from being rendered even though all of the medical opinion is to the contrary by qualifying himself as an expert from what he has heard innumerable doctors testify in prior cases and saying that these medical experts are all wrong.

The purpose for which the summary rule procedure was devised will be defeated if affidavits such as those of counsel here are to be taken as sufficient to prevent the rule from being applied.

Respectfully submitted.

H. C. WALKER, JR.
LEON O'QUIN
ARTHUR O'QUIN
ELIAS GOLDSTEIN,

Attorneys for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET AL., PETITIONERS

v.

ARKANSAS NATURAL GAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

H. C. WALKER, JR.,
LEON O'QUIN,
ARTHUR O'QUIN,
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PETITION FOR REHEARING

Now comes ARKANSAS NATURAL GAS CORPORATION, respondent herein, and with respect shows that the opinion of this Honorable Court in this matter is erroneous and that a rehearing should be granted. The reasons for this contention are these:

1. This Court holds that the evidence is inconclusive because the eight witnesses whose affidavits were produced were either admittedly or apparently in the same position as the respondent and therefore consciously or unconsciously biased. This was not the opinion of the district judge, who is familiar with the Richland gas field, its history and development, the various large companies operating there, the independent operators like Hunter and Feazel, and the part they have played in the develop-

ment of the field and the making of a price for the gas produced therefrom. He knew as well as the litigants the local situation; and he accepted the proof as to the 3¢ market price on the basis of his own knowledge and his own judgment as to the character, information, experience and credibility of the several witnesses. It is familiar law that in regard to the credibility of witnesses the opinion of the district judge is entitled to controlling weight.

This Court, possessing no such basis for an informed judgment, has reversed the ruling of the district judge on an assumption of bias, which as to at least two of the witnesses is not even colorably justifiable. Eliminate if you will all other witnesses save Hunter and Feazel—both of whom are individual operators of the hardy and independent type with which the oil industry abounds—and we still have a case where the evidence is all for the respondent.

2. We respectfully submit that what has been overlooked here is the entire absence of evidence for the petitioners. If cross examination of respondent's eight witnesses would have brought out facts different from those stated in the affidavits, petitioners were strangely silent in the district court in the matter of asking that court to permit such cross examination. In his affidavit (**R. 42, 43**) the learned counsel for petitioners says that it is "impossible for plaintiffs in this case to produce the affidavits of persons expert in the price of gas * * * because all of said persons are hostile to plaintiffs".

In other words, we have here a case in which the district judge, residing in a gas producing territory, familiar with its practices, its standards and its personnel, is presented with the sworn statements of witnesses whom he considers credible and informed, all of whom testified that a wellside price of 3¢ per MCF existed in the Richland Field during the first three years of production from it. No evidence

is offered to the contrary. We have, then, the exact situation with which Rule 56 was intended to deal.

3. If it be wise and commendable to first build up and then tear down, the decision here rendered should be permitted to stand, otherwise not; for its baffling effect must be to largely neutralize the work of committee and court in preparing and adopting Rule 56 of the Federal Rules of Civil Procedure. However viewed, the holding here is that even though the evidence proffered on a particular issue under that rule wholly supports the defense and wholly controverts the plaintiffs' case, the court must nevertheless go through with the formality of a trial—the very thing that Rule 56 was intended to stop.

Both the district court and the Court of Appeals found as a fact that the supporting affidavits showed that during the first three years of production from the Richland Field there was a market at the well for the gas and the market price was no more than 3¢. The fact that a jury found differently as to the average market price over a period of subsequent years is treated as having controlling weight, thus ignoring the difference in conditions and also ignoring the fact that the numerous juries before whom these market price cases have been tried have fixed in each case a different market price, the last price fixed being 3¢ or less.[1]

Note 1: See, for example:

Arkansas Natural Gas Company v. Sartor,
78 Fed. (2d) 924—4½¢;

United Gas Public Service Co. v. Pardue,
78 Fed. (2d) 929—4.45¢;

Union Producing Company v. Driskell,
117 Fed. (2d) 229—4¼¢;

Hemler v. Hope Producing Company,
117 Fed. (2d) 231—3¢;

We say again that if under the circumstances of this case the district judge may not validly determine that there is no real issue of fact to be tried, Rule 56 has no meaning and those who so laboriously wrought it into being wasted their labor.

We respectfully submit that a rehearing should be granted.

HENRY C. WALKER, JR.,
LEON O'QUIN,
ELIAS GOLDSTEIN,
ARTHUR O'QUIN,

Attorneys for Respondent.

* * * *

I, Elias Goldstein, one of the counsel for respondent in this case (petitioner for rehearing), do hereby certify that this petition for rehearing is presented in good faith and not for delay.

ELIAS GOLDSTEIN.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET ALS,
Petitioners & Plaintiffs

versus

ARKANSAS NATURAL GAS CORPORATION
Respondent & Defendant

MOTION FOR REHEARING, AND BRIEF IN SUPPORT THEREOF.

G. P. BULLIS,
Counsel for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET ALS,
Petitioners & Plaintiffs

versus

ARKANSAS NATURAL GAS CORPORATION
Respondent & Defendant

MOTION FOR REHEARING, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices:

Now into Court come J. M. Sartor, D. R. Sartor and Mrs. Earline Sartor, plaintiffs herein, and respectfully suggest that the opinion and decree herein rendered on March 27th, 1944, is incomplete, and that a rehearing should be granted, for the following reasons:

1.

The refusal of this Court to review and revise the clearly erroneous jurisprudence of the Court of Appeals herein, on the second question presented by petitioners, namely, the method to be used in determining the market price of natural gas in a gas field, condemns all land own-

ers in the many natural gas fields of the United States to perpetual inability to enforce their contracts for a share of the natural gas produced from their lands, because the Court perpetuates the jurisprudence that in fixing the market price, numerous factors must be taken into consideration, which can be testified to only by experts employed by the gas companies; whereas if the simple and clearly correct method were used, of fixing the market price from actual bona fide sales in the field, the land-owners could obtain their rights in court.

2.

The Court accepts as correct and thereby perpetuates the ruling of the Court of Appeals that the market price to which all land-owners are entitled is "(1), the market price at the well, or (2), if there is no market price at the well for gas, what it is actually worth there. . . . "

This is squarely contrary to the local law, namely, the decision of the Supreme Court of Louisiana in the case of *Wall vs. United Gas Public Service Co., 178 Louisiana Reports 908, 152 Southern Reporter 561,* in which the Supreme Court of Louisiana were construing a lease contract identical with the lease here at bar, and ruled:

> "We think it reasonable to assume that the parties intended that, if there was a market for gas in the field, the current market price there would be paid."

And this ruling is also squarely contrary to the express ruling of the same Supreme Court of Louisiana in the case of *Sartor vs. Union Carbon Co., 183 Louisiana Re-*

ports 287, 163 Southern Reporter 103, in which that Court said:

> "This Court, in the cace of *Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561*, held that the language in the lease which required the royalty to be paid on the basis of the market price at the well was synonymous with the market price at the field where the gas was produced."

The foregoing rulings have never been changed by the Supreme Court of Louisiana.

3.

The ruling of the Court of Appeals, which your Honors refuse to review, also violates the fundamental, simple rule laid down by the Court in the case of *Muser v. Magone, 155 U. S. 240, 249*, holding that the market price is:

> "Such prices as dealers in the goods are willing to receive and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

Wherefor plaintiffs and petitioners make this motion that a rehearing be granted herein, and that the Court review and revise the jurisprudence of the Court of Appeals on the Second Question presented in their petition for writ of *certiorari* granted by the Court, in order to prevent a denial of justice to all land-owners, and to bring the jurisprudence of the Court of Appeal into line with the jurisprudence of the Supreme Court of Louisiana.

G. P. BULLIS,
Counsel for Plaintiffs & Petitioners

BRIEF

MAY IT PLEASE THE COURT:

We deeply appreciate the decree of the Court granting petitioners trial by jury in this case; but we are constrained to call the attention of the Court to the fact, that the refusal of the Court to consider the Second Question presented in our petition for *certiorari* herein, leaves all land-owners everywhere in a natural gas field, at the mercy of the gas producers, and leaves the jurisprudence of the Court of Appeals squarely in conflict with the decisions of the Supreme Court of Louisiana on exactly similar contracts.

1.

Your Honors decision perpetuates the requirements of the Court of Appeals for the evidence to be furnished in the trial of these cases before a jury, namely:

> "In determining this actual value . . . every factor properly bearing upon its establishment should be taken into consideration. Included in these are the fixed royalties obtaining in the leases in the field, considered in the light of their respective dates, the prices paid under the pipe-line contracts, and what elements, besides the value as such of the gas, were included in those prices, the conditions existing when they were made, and any changes of condition, the end and aim of the whole inquiry, where there was no market price at the well, being to ascertain upon a fair consideration of all relevant factors; the fair value at the well of the gas produced and sold by defendant."

It is self-evident that only experts in the gas business can testify to the above facts. It is also self-evident that these experts are in the employ of the gas companies, and will be unwilling to testify for farmers.

We earnestly ask your Honors to consider the tremendous injustice to all land owners in gas fields, thus to require them, when they come into Court to enforce their contracts, to produce evidence in the power of only their adversary.

We ask the Court to reconsider the simple, undisputed fact in this case:

All of the gas sold in this gas field, an immense quantity, was sold right in the middle of the small field, to pipe lines coming into the field to buy it (with trivial exception). This is entirely undisputed.

Does not simple justice to land-owners require that these sales be declared to be the market price? Do not these sales meet the definition of market price given in the case of *Muser v. Magone, 155 U. S. 240*, as the sales between willing buyer and a willing seller in the ordinary course of trade?

We ask the Court to consider how simple this entire issue would become if that rule were adopted, instead of the complex formula laid down by the Court of Appeals.

2.

The case of *Sartor v. United Gas Public Service Co., 186 La. 555, 173 Southern Reporter 103*, cited by the Court

of Appeals as justification for throwing out of consideration all sales of gas in the field, was a case in which the Supreme Court of Louisiana ruled on the evidence in that particular case. A ruling on evidence does not make jurisprudence, because the evidence in another case will be entirely different.

The Supreme Court of Louisiana has never withdrawn from the jurisprudence laid down in the case of *Wall v. United Gas Public Service Co.*, and *Sartor v. United Carbon Co.*, cited hereinabove in our motion. That jurisprudence is squarely contrary to the jurisprudence of the Court of Appeals, as shown in the Second Question presented in our petition for *certiorari*.

Respectfully submitted,

G. P. BULLIS,
Counsel for Petitioners

SUPREME COURT OF THE UNITED STATES.

No. 232.—October Term, 1943.

J. M. Sartor, et al., Petitioners, vs. Arkansas Natural Gas Corporation. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 27, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

This litigation, begun a decade ago, has been terminated by a summary judgment, and whether rightly so is the issue. The suit has weathered four adjudications, including two trials, in District Court and four decisions by the Court of Appeals.[1] We will recite only such of its history as bears on the issues as to summary judgment, since we consider no other question.

Sartors are landowners in Richland Parish, Louisiana, who in March of 1927 leased their lands for natural gas development. The lease, so far as here important, provides that " . . . the grantor shall be paid one-eighth (1/8) of the value of such gas calculated at the rate of market price and no less than three cents per thousand cubic feet, corrected to two pounds above atmospheric pressure . . . ." For many years the lessee made settlement at the 3¢ rate. The suit was based upon the contention that during all of the years from 1927 to 1932 inclusive such market price was considerably above 3¢. At the last trial the court held that the claims for gas produced prior to the 20th of March, 1930 were barred by the statute of limitations or, as it is called in Louisiana, by prescription. The issues as to gas produced between March 20, 1930 and the commencement of the action were submitted to the jury, which returned a verdict: "We, the Jury, find for the Plaintiffs that the average price of gas at the well in Richland Parish, Louisiana, field during the period beginning March 20, 1930, and ending March 20, 1933, to be .0445 per 1000

[1] Arkansas Natural Gas Corp. v. Sartor, 78 F. 2d 924; Arkansas Natural Gas Corp. v. Sartor, 98 F. 2d 527; Sartor v. Arkansas Natural Gas Corp., 111 F. 2d 772; Sartor v. Arkansas Natural Gas Corp., 134 F. 2d 433.

cu. ft. at 8 oz. pressure." The Circuit Court of Appeals affirmed "so far as the verdict of the jury fixed the market value of the gas upon which plaintiff is entitled to recover royalties." However, it reversed the ruling that part of petitioner's claims were barred by the statute of limitations and remanded the case for trial of the same issues as to market price of gas produced prior to March 20, 1930. The respondent-defendant then filed a motion for summary judgment under Rule 56. The motion was granted and the Court of Appeals affirmed.[2] The importance of questions raised under the summary judgment rule led us to grant certiorari.[3]

The controversy, both as to whether there is a cause of action and, if so, in what amount, turns on whether the "rate of market price" during this period before March 20, 1930 was above 3¢ per m.c.f., as it is conclusively adjudged in this case to have been thereafter. It is held in Louisiana that the market price under such leases is to be ascertained at the wellhead, if there is an established market price at that point. Unfortunately, this rule requires that the price for royalty purposes be ascertained at a place and time at which few commercial sales of gas occur. The lessees who market this royalty gas along with their own production do not customarily make their deliveries at the wellhead but transmit gas from the several wells some distance in gathering lines, turning it over to large buyers at points somewhat removed, and under conditions of delivery different from wellhead deliveries. The price producers receive at these delivery stations often is substantially above the 3¢ price to the landowner. The practice of fixing the price of landowner's royalty gas at one time and place and of marketing his gas for a different price at another delivery point raises the dissatisfaction and problems which produce this case.

The Court of Appeals, correctly we think, followed the Louisiana substantive rule that the inquiry in a case of this kind shall determine (1) the market price at the well, or (2) if there is no market price at the well for the gas, what it is actually worth there, and "in determining this actual value . . . every factor properly bearing upon its establishment should be taken into consideration. In-

[2] 134 F. 2d 433.

[3] — U. S. —.

cluded in these are the fixed royalties obtaining in the leases in the field considered in the light of their respective dates, the prices paid under the pipe-line contracts, and what elements, besides the value as such of the gas, were included in those prices, the conditions existing when they were made, and any changes of conditions, the end and aim of the whole inquiry, where there was no market price at the well, being to ascertain upon a fair consideration of all relevant factors, the fair value at the well of the gas produced and sold by defendant."[4]

The defendant asked a summary judgment because it averred "there exists no reasonable basis for dispute" that during the period in question there was a market price at the wells and that it did not exceed 3¢ per m.c.f. To sustain this position it filed affidavits, a stipulation of facts, and several exhibits. The plaintiffs resisted on the ground that the motion was inadequately supported on the face of defendant's papers. An affidavit by plaintiffs' counsel analyzed defendant's affidavits in the light of testimony given by the witnesses at prior trials; asserted that all were interested witnesses whose testimony was rejected on previous occasions; recited previous verdicts in the case; and setting forth affiant's experience in ten trials of this character arising out of leases in this field, asserted his knowledge of the market prices there and declared it to be more than 5¢ per m.c.f. at the wellhead.

It should be observed that the entire controversy here turns on questions of valuation. The only issue relates to market price or value of plaintiffs' gas at the time and place of delivery. If there has been no damage in the sense of failure to pay the full market price, then there is no cause of action, and if there has been damage in such sense, there is a cause of action.

The summary judgment rule provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, *except as to the amount of damages*, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis supplied.) Where the undisputed facts leave the existence of a cause of action depending on questions of damage which the rule has reserved from the summary judgment process, it is doubtful whether summary judgment is warranted on any showing. But at least a summary disposition

[4] 134 F. 2d 433, 434-35.

of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.

The defendant undertook to establish the absence of a triable issue by the affidavits of eight persons. It may be assumed for the purposes of the case that the witnesses offered admissible opinion evidence which, if it may be given conclusive effect, would sustain the motion. It will serve no purpose to review it in detail, and we recite only the facts which made it inconclusive. Affiant Harris was the Vice President and General Manager of the defendant, clearly an interested witness. Hunter was a lessee and the producer of gas with interests apparently similar to those of the defendant. Hargrove was Vice President of a gas pipeline company, owning leases and producing gas, which the plaintiffs' attorney by affidavit avers is defending on similar cases brought by these plaintiffs and others. Florsheim is an executive officer of two gas producing companies with similar interests to the defendant, and he avers that the price in the Richland field was never in excess of 3¢, although in this very case it is adjudged at one time to have been more. Stokes is the Chief Clerk of a producing company and recites that the records of his company show that "after deducting from the gross price realized by these various corporations for gas produced from the Richland gas field during the period 1928-1930 inclusive, the actual average unit cost of gathering and delivering the aforesaid gas, the net realization of those corporations from the sale of gas during aforesaid period did not exceed 3¢ per MCF." Waiving the question whether the contents of written records can thus be proved, it would hardly seem that a conclusion, based on so complicated and indefinite a calculation, should be accepted from an employee of a corporation with an interest in the market price of gas similar to the defendant's without opportunity to cross-examine. Feazel is another producer of oil and gas from many leases, who avers that the price paid never exceeded 3¢, notwithstanding the jury verdicts. McHenry is a lawyer and executive officer of a company operating gas properties with interests similar to the defendant's. Taylor is an officer of a similar producing company.

Apart from these, and contracts and leases useful only in connection with the testimony of these witnesses, defendant offered a bulletin of the Federal Bureau of Mines, which included a table showing the estimated value at the wells of gas produced in

Louisiana to be 3¢ per m.c.f. in 1927 and 3.3¢ in 1928. In so far as state-wide statistics could have any value in proving the local market, this would seem to sustain the plaintiffs' contention that the price was over 3¢. Defendant also relied on a stipulation of facts. This stipulation recited a number of contracts for the sale of gas under various conditions, at various prices, some considerably in excess of 3¢. It also showed the cost of delivery from the wells to the point where these sales were made to be 0.3¢ per m.c.f. Much of the controversy, as will be seen from the prior history of the case,[5] is over the question whether these contract prices may be used in aid of the plaintiffs' case. Defendant uses these contracts only to explain their prices away by showing differences in market conditions. They do not establish the claim that there is a wellhead market price. The stipulation also recites that about one-third of the leases in this area specify the royalty in substantially the same terms as the lease in suit, the rest providing for a fixed royalty of 3¢ per m.c.f. About 90 per cent of the payments to be based on market price have been made on the basis of 3¢, and the remaining 10 per cent at 4¢ per m.c.f. We certainly cannot rule as matter of law that the 4¢ price paid for 10 per cent of such royalty gas is not a factor to be considered by a fact-finding tribunal in fixing the market value, and is, or may be, some evidence to sustain plaintiffs' contentions.

To summarize the features of the defendant's motion papers:

1. The only evidence in support of defendant's contention as to the wellhead market price is opinion testimony of experts.

2. Each of them either is an officer of the defendant or is a lessee, or is an employee or officer of a lessee corporation, engaged like defendant in gas production, and each certainly is open to inquiry as to the truth of plaintiffs' attorney's sworn statements that each has interest in or bias as to the subject matter of this litigation.

3. Every one of defendant's witnesses had testified to the same general effect on the trial of the claim wherein the jury found against the testimony and the Circuit Court of Appeals affirmed the verdict.

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[5] See Arkansas Natural Gas Corp. *v.* Sartor, 78 F. 2d 924 (appeal after first trial); Sartor *v.* Arkansas Natural Gas Corp., 134 F. 2d 433 (decision below); cf. Sartor *v.* United Gas Public Service Co., 84 F. 2d 436; Sartor *v.* United Gas Public Service Co., 186 La. 555, 173 So. 103; Pardue *v.* Union Producing Co., 117 F. 2d 225; Driskell *v.* Union Producing Co., 117 F. 2d 229; Hemler *v.* Hope Producing Co., 117 F. 2d 231.

4. Defendant undertook by its motion to show that it was beyond controversy that the 3¢ price prevailed constantly and not as a matter of averages for the entire period ended March 19, 1930, although prior trial had conclusively adjudged that on March 20, 1930 and thereafter the price or value averaged 4.45¢ as recited in the jury verdict. No evidence is presented of any sudden change, and no fact is offered to explain any change in the market and price of such gas. In fact any change is inconsistent with defendants' position in the former trial, which was that at no time in either period had the market exceeded 3¢.

The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. *American Insurance Co.* v. *Gentile Brothers Co.*, 109 F. 2d 732; *Whitaker* v. *Coleman*, 115 F. 2d 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end.

In considering the testimony of expert witnesses as to the value of gas leases, this Court through Mr. Justice Cardozo has said: "If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury or to a judge or to a statutory board." *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U. S. 290, 299. Cf. *Halliday* v. *United States*, 315 U. S. 94, 97; *Forsyth* v. *Doolittle*, 120 U. S. 73, 77; *McGowan* v. *American Pressed Tan Bark Co.*, 121 U. S. 575, 609; *Quock Ting* v. *United States*, 140 U. S. 417, 420; *Head* v. *Hargrave*, 105 U. S. 45, 50; *Union Insurance Co.* v. *Smith*, 124 U. S. 405, 423. The rule has been stated "that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony." *Spring Co.* v. *Edgar*, 99 U. S. 645, 658. ". . . the jury, even if such testimony

be uncontradicted, may exercise their independent judgment." *The Conqueror*, 166 U. S. 110, 131. ". . . the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U. S. 401, 408.

This Court has said: "The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function." *Aetna Life Insurance Co.* v. *Ward*, 140 U. S. 76, 88.

We think the defendant failed to show that it is entitled to judgment as matter of law. In the stipulation, the bulletin, the affidavit of the plaintiffs' attorney and the admission of its witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that supports plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner. The judgment accordingly is

Reversed.

Mr. Chief Justice STONE, dissenting.

It is not denied that the two courts below have correctly applied the state law governing the right to recover royalties on the par-

ticular type of gas lease here in question. By that law, in order to recover further royalty payments in excess of the 3 cents per 1,000 cubic feet of gas, which petitioners have already received, they must sustain the burden of showing that during the relevant period, the market price or value of the gas at the wellhead exceeded 3 cents. By Louisiana law also and upon principles of proof which it is also not denied that the courts below correctly applied, the "pipe line" price of gas, without qualifications and supplementary proof wholly lacking in this case, is not evidence of market price or value at the wellhead. Consequently, on the motion for summary judgment, the single issue was whether petitioners had any evidence by which they could sustain the burden resting on them of showing that during the revelant period, there was a market price or value of gas in excess of 3 cents at the wellhead.

True, Rule 56(c) of the Rules of Civil Procedure excludes from the summary judgment procedure any issue as to the "amount of damages", where there is an admitted right of recovery but the amount of damages is in dispute. But the Rule does not exclude from that procedure the issue of damage *vel non* when that is decisive of the right to recover. This is made plain by subdivision (d) of Rule 56, which provides for a partial summary judgment and declares that the order shall specify the "facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy". Obviously, if it appears that there is no evidence of damage, the "amount of damages" is not in controversy and the court is not precluded from giving summary judgment for the defendant.

On the single issue here presented, whether petitioners' right to recover can be established by a showing of market price or value of the gas at the wellhead, in excess of 3 cents, respondent's affidavits and documentary evidence and a stipulation of facts show that all such sales of gas during the relevant period were at 3 cents or less. The affidavits also showed by opinion evidence of qualified experts, the disinterestedness of some of whom is not, on the present record, open to challenge, that the market price and value of the gas at the wellhead did not exceed 3 cents. To meet the prima facie case thus made out by respondent's papers, petitioners tendered only proof of pipe line prices, each of which the state or federal courts had held in earlier cases to be no evidence of

market price or value of the gas at the wellhead. See *Sartor* v. *United Gas Pub. Serv. Co.*, 186 La. 555, 559-569,[1] and ceses cited.

It is irrelevant to any issue now presented that as to a later period, as the field more nearly approached exhaustion, a jury had returned a verdict sustained by the court below, by which it was found that the average market price or value at the wellhead was in excess of 3 cents. Since this was the average for a three year period, it does not indicate any sudden advance in price, and is without probative force to show a market price or value in excess of 3 cents during the earlier period here in issue for which petitioners have tendered no probative evidence of a higher price.

Nor is it sufficient to raise a genuine issue here that it appears with respect to 3-1/3% of the approximately 900 leases in the gas field, that settlements were made for royalties of 4 cents. Respondent's motion papers show, without contradiction, that these settlements "in almost every case" were compromises of disputes as to whether the lease in question had been properly developed, whether the lessor was entitled to a further royalty on gasoline recovered from the gas, or whether the lessee or lessor should bear the burden of a local severance tax. Such compromises of issues not present here furnish no indication of the market price or value at the wellhead, which alone is the issue decisive of this case.

Further, in the circumstances of this case, it is unduly restrictive of the summary judgment procedure to say that respondent's motion for summary judgment must be denied because it is supported *in part* by affidavits of interested expert witnesses who are not subject to cross-examination by the plaintiffs. Such an interpretation of the rule can hardly be invoked in behalf of petitioners here, who tender no probative evidence to challenge either the proof of actual sales at wellhead at 3 cents or less or the testimony of the experts, and who have not sought to avail themselves of the privilege afforded by Rule 56(e) and (f) to take the experts' depositions or to offer the cross-examination of these witnesses at the former trials of this action. The summary judgment procedure serves too useful a function in terminating ground-

[1] This suit, brought by the present petitioners, turned on precisely the issue here litigated—the market price of gas at the wellhead in the Richland field. The Louisiana Supreme Court said that the defendant lessee in that case "proved conclusively that the market price in these fields does not exceed 3 cents per thousand cubic feet". 186 La. 555, 569.

less litigation to warrant its limitation in a way which Rule 56 does not admit and on grounds so insubstantial.

On this state of the record both courts below have held that the issue whether petitioners have any proof tending to support the burden which rests on them to show market price or value at the wellhead in excess of 3 cents, must be resolved against them. I think that the courts' conclusion is correct; that they properly applied the summary judgment procedure, and that the judgment should be affirmed.

Mr. Justice REED joins in this dissent.